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THE LAW OF RIOT. THE PORTLAND RIOT.[1]

No small amount of error and misconception has, undoubtedly, prevailed respecting the unfortunate occurrences which took place in Portland on the night of the 2d of June last. This may be attributable, in a great measure, to the conflicting mediums through which these transactions were viewed and conveyed, and no less to the previous feelings by which the events were more or less colored. There can be no doubt that the excitement had its origin in opposition to the severe principles and despotic provisions of the Maine Law; and that it was brought to a point by the election of its principal champion to the office of mayor of Portland, and placing the local administration in the hands of its responsible author.

The power of the law having fallen by the election into the hands of its friends, who undertook to prove its virtue, it is not to be wondered that they should be held to a strict and tenacious account of its working. Still, it would

[1] 1. Report of the Committee of Investigation of the Riot in the City of Portland. Portland: Benjamin D. Peck, City Printer, pp. 50.

2. The Death of John Robbins, of Deer Isle, who was shot in the Streets of Portland by order of Neal Dow, Mayor, June 2d, 1855. A full Report of the Testimony taken before the Coroner's Inquest, as published in the "State of Maine" newspaper. Portland: published by Bearce, Starbird, Rich & Co. 1855. pp. 112.

3 Review of the Testimony taken before the Second Inquest on the Body of John Robbins, who was shot in Portland, June 2d, 1855; together with Remarks on the Report of the "Investigating Committee" appointed by Mayor Dow and the Aldermen, June 9th, 1855. pp. 32.

be unjust to attribute the whole evil to this source. It is to be acknowledged, at the same time, that deep and momentous principles are concerned in the inquiry of what took place upon this occasion, — principles of no less importance than those involving the peace, order, and welfare of society. Questions are raised of the right of the civil power to employ the military arm; of the limit to which the municipal authority must be confined in using measures for its own preservation against tumult and violence; and the consequent necessity of making out a complete justification in case of resort to those extreme acts by which human life may be endangered, — that highest boon in legal contemplation, which is fenced by so many guards and prohibitions, so sacred that the law pronounces the taking of it by human hands nothing less than murder, — and makes it incumbent on whomsoever may be the cause to mitigate or extenuate it, by showing that it was done, if voluntarily, under some apparent necessity, as of self-defence, or the prevention of some crime against the safety and good order of the community. It is maintained that even the magistrate, in case of disturbance, throughout and to the very last, must exhaust every other expedient before venturing to approach this dreadful necessity; that he must use every possible precaution, and be responsible for every omission in the exercise of the utmost practicable forecast and discretion; — and that even the unlicensed mob has the right to hold the magistracy to a strict and careful execution of law.

It is certainly fit that any erroneous impressions on such perilous subjects should be rectified. What has once happened may happen again, and should have its useful lesson. These remarks are not designed to serve any mere purpose of reproach or reprobation. Such a purpose would be no less unseasonable than unavailing. Some of those concerned in the outrage were made to suffer with severity. The tumult was quelled, and so far the law was vindicated and authority maintained. Ample room, however, remains for regret and reflection.

To take a just and correct survey of these circumstances, it may be useful to premise something of the actual state of things at the time, particularly in relation to the existing police of the city, and the condition of the city authorities, and, in connection with the duties of citizens, the bearing of legal provisions upon what is required of them under such emergencies. Nothing is proposed touching the

merits of the Maine Law, as it is termed, or the conduct of the mayor, any further than concerned in the occasion. The remarks that follow have no object but truth and justice, and are made in no other interests than those of law and order. And there is that in the subject that is too serious and important to be dismissed as a matter of temporary and passing moment only. A calm voice may have a better chance to be heard when the din and tumult have subsided.

To begin with the condition in which things were on the eve of this disturbance, it may be mentioned that the standing, effective police of the city consists of a limited number, not very large, which is found sufficient for its ordinary duties. This number, commonly not exceeding thirty, is employed in different parts of the city for the day, and distributed upon its various rounds in regular relief parties during the night. This ordinary police does not require to be furnished with any kind of weapons, beyond what are needed for common purposes of support and defence. The badge of office is usually sufficient for all needful objects, along with ordinary prudence and energy.

Against unforeseen emergencies, such as tumults and riots, an extraordinary police becomes necessary. This may be the subject of preliminary or provisional arrangement, upon a more general or limited scale, according to the probable ground of apprehension. Relays may be formed, or volunteers enrolled and accepted, against impending perils to peace and order to which the ordinary police force is not adequate. These may consist of individuals enlisted or formed into organized companies. They may be individuals, — firemen, for example, — or they may be composed of fire companies. The services of any other available associations may be equally accepted as auxiliaries. There can be no absolute previous limit, of course, to power of this kind, but the measure of precaution requisite for the public safety. The whole strength of the community may be invoked and applied.

The law on no occasion contemplates the specific employment of military force, as that phrase is properly understood, except in cases as constitutionally and legally provided for; such as insurrection and invasion, where the whole order of the community is endangered, and the authority of the government itself attacked or attempted to be subverted. The State itself has no standing military

force. It is against the genius of our system. Its militia are still, in all respects, and nothing but, citizens; not separate from the mass, only as occasionally subject to certain stated legal requirements; all of which look purely to the peace, order, and protection of the community against illegal violence. The whole compulsory system is now done away. As the militia is now constituted and organized in Maine, it is nothing but a volunteer disciplined force, armed by the State, adopted and recognized by law, and accepted for the lawful purposes of the community.

The proper civil authority is what is relied on for the suppression of tumult and disorder, and its efficient exercise and employment contemplated, in the first place, in no other than the regular and customary modes. That responsibility is duly devolved upon the municipal power or magisterial authority to disperse and quell any unlawful, riotous, or tumultuary movement within its precinct. In case of any such unlawful meeting, made up of a dozen or more persons, armed with clubs or any other dangerous weapons, or to the amount of thirty, whether armed or not, collected in that manner, and exhibiting such a temper, it is made by law the special duty of the mayor and each of the aldermen of every city, and of each of the selectmen and constables of the town, and of every justice of the peace in such town, and also the sheriff of the county and his deputies, — equally prescribed to them all alike, — to go among the crowd, or as near as may be safe, and command them all, in the name of the State, to desist and disperse immediately and peaceably.

It is further made the duty of each of said magistrates and officers to command the assistance of all persons present, without distinction, in arresting and securing such disturbers; and it is moreover declared, that every person so called upon, and refusing to render his assistance in suppressing and dispersing it, shall be considered as making one of the unlawful assemblage, and shall be liable to be treated and dealt with accordingly. This marks the line, and becomes the criterion of the character of those present and engaged.

And every such magistrate (mayor, alderman, &c.) or other officer, *having notice* of such unlawful or tumultuous assembly in the city or town where he dwells, who shall refuse or neglect immediately to execute his duty as so provided, is thereby subjected to severe penalty.

This making proclamation, *in the name of the State*, to desist and disperse, is what is popularly termed reading the Riot Act, — a phrase commonly understood. This is a legal form required to give validity to the stronger and more decisive proceedings which may become necessary to the object, and without which preliminary the authorities would proceed at their peril, so far as their measures might exceed the absolute necessity, and result in the injury of innocent persons.

When the ordinary measures fail for the dispersion of the riotous assemblage, "without unnecessary delay," provision is then made for requiring the aid of a sufficient number of persons, *in arms or otherwise*, by any two of the magistrates or officers before mentioned, who shall proceed in such a manner as they may judge expedient, to suppress such riotous or tumultuous assembly, &c. And whenever such *armed* force shall be called out according to this provision, the persons so embodied are required to obey such orders as they may receive from certain designated persons. These may be the governor, or any judge of court, or sheriff of the county, or any two of the other magistrates or officers before mentioned. And then, if any such persons, so unlawfully assembled and refusing or neglecting to disperse as soon as possible, though reduced below the number of twelve, or any other persons actually present, whether remaining as mere spectators or otherwise, shall be killed or wounded, such magistrates and officers, and all acting with them or under their orders, shall be justified and held guiltless. And, on the other hand, if any of such magistrates or officers, or those acting by their order and direction, shall be either killed or wounded, all who are joining in the unlawful assembly, or withholding their required aid, are held to be guilty and responsible alike.

The law, it will be borne in mind, justifies a homicide which takes place in preventing any attempt to commit a felony. The killing of any person employed in preserving the peace, in any capacity, is thus made felonious in all that are thus engaged in the violation, without distinction. The character of the act, which all who are thus concerned are thereby made to assume, may thus, in its consequences, amount to nothing less than felony.

It may be important to all peaceful citizens to understand the position in which they are liable to be placed upon such occasions; and the law of the State is certainly

in no fault in not leaving it defined with sufficient precision.

These provisions, it will be perceived, however, have nothing to do with the mere case of self-defence, — the sacred right of individuals, within the limits and under the regulations of law. That is a perfectly distinct subject, and does not come up on either side of the present question. The magistrate has no occasion to claim it. Any one who is engaged in the unlawful proceeding, after being called upon to desist, cannot protect himself by it. It is a subject belonging to the criminal law of the land. Any such analogy would only embarrass the inquiry.

These provisions of law, moreover, it will be observed, do not relate in any way to the calling out of the military, as that is legally understood. That is the exclusive province of the governor, as the executive and commander-in-chief. It is a wholly distinct matter. That, and that only, is what can be properly called the *military*, when put in requisition according to law, whether for training and discipline or inspection, or, what may be the test, as liable to be placed under rules of military government, such as are denominated articles of war. This subject may not be well distinguished and understood. At one time, by the laws of Maine, the military was made liable to be called out by magistrates or certain civil officers in local disturbances. But that authority was not thought necessary or proper to be so delegated in support of the ordinary provisions of law, which were probably deemed sufficient for every common purpose, and the provision was consequently repealed. This fact does not appear to have been perfectly understood, as is apparent, by the municipal authorities of the city, or perhaps its civil advisers, on the eve of these unhappy occurrences.

Whether it was understood any better by the previous city government, its immediate predecessors, after the repeal, also is not altogether apparent. It well appears, however, that a certain agreement was entered into and adopted between the city authorities and two or three of the volunteer military corps, raised and formed within the city, for a stipulated consideration, to render their services as an armed police force to aid the city and its civil officers in any emergency, in suppressing any riots and disturbances that might happen, whenever they might be called upon. It does not appear that there was anything repugnant to their regular duties in an arrangement of this

kind to perform such a stipulated service; or that it was incompatible or incompetent for them or for the city to enter into such a compact, either as individuals or companies. The consideration being received by them in their associated capacities, it would be as properly binding upon them as such, as it would upon the individuals composing the companies. What more proper or useful service could they perform? Such service was appropriate; and what was engaged, other than was expressed, it must be difficult to conceive. In point of fact, just such an arrangement had already been in existence from about the time the act (of 1844) referred to above had been repealed. Neither that act, nor its repeal, could have any bearing upon the subject, which was left as if nothing of that kind had ever existed.

It is observable that the law, as it long has been and now stands in Maine, converts all persons who may be present at such an unlawful assembly, after the proclamation in the name of the State to disperse, into an auxiliary police, except those who, by their passiveness and refusal, have allowed themselves to be confounded and identified with the riotous mass. This special call to act as an extra police, is necessarily confined to those present, and extends no farther. Beyond this the civil authority is empowered, by the same act, to require the aid of any number of persons, present or elsewhere, with arms, if needed, in order to quell the tumult. These may, undoubtedly, be collected and embodied *ex tempore* upon the spot, if the arms are at hand, or they may be called in as soon as they can be formed. There can be no objection either to a provisionary and precautionary arrangement for that purpose, of whatever kind shall be best calculated to meet such an emergency. And there seems to be no doubt of the competency of a military company of citizens to meet and obey such a call, whether under any actual engagement or not; nor of the propriety and advantage of calling upon and accepting those who may be most accustomed to the use of arms, if that measure must be resorted to. An irregular, tumultuary, and undisciplined array of force might only serve to increase the difficulty and inflame the *melée*. The benefit of discipline is felt not only to overawe, but in its greater efficiency and economy of strength, and better management of force; especially in the use of the bayonet,— a critical expedient, when the last extremity, the necessity of firing, can be avoided.

There is certainly no reason why such an existing force in the body of the community should be exempted from such a call of duty; which all citizens are alike called to obey, and which can be performed by such a portion with so much more activity and utility. What is the real importance of militia in peace, except for such orderly purposes? The rest is comparatively holiday exercise or amusement. There is no reason to fear that citizens in arms, as a police, would be too prompt or precipitate in acting against their unarmed fellow-citizens. On the other side, why should they be deterred or discouraged in what may become the performance of an imperative duty?

Such was the general state in which the occurrences of the 2d of June found the city authorities. An agency had been established by the city government, under the limited provisions of the late act of the legislature, for the special sale of liquors, prohibited to be sold in any other manner. A quantity had been duly purchased therefor, and became the legal property of the city. They were placed in a suitable storehouse, a central building belonging to the city. Some question appears to have been started about the regularity of the transaction; that is, whether the purchase was made in strict compliance with the statute,—a scruple more readily raised on account of the severity with which its enactments had been executed; but there was no question made of the *bona fide* object and character of the purchase, or that it was made, in fact, for any other purpose than was professed.

Among the mischances that had had their share in this unhappy business, may be reckoned a casual and heedless reply to a rather abrupt and inopportune interrogatory, which could scarcely be considered serious, or as expecting very categorical answer,—that was, whether the mayor had been purchasing this large quantity of liquors on his own private account. It was a question on which the inquirer, one of the board of aldermen which had authorized the purchase, might have been naturally supposed to have been previously better informed than he really proved to be. The subject had been acted upon at a regular meeting, at which he did not happen to be present; but was again brought up and ratified at one which he attended, although it did not seem to have arrested his particular attention. The inquiry, therefore, might not have been thought so much in earnest by the mayor, to whom it was put, occurring, as it did, in a kind of bantering conversation,

and treated as a piece of badinage. In the end, and the version that was given of it, it may be deemed a matter of sober caution against indulging in idle speeches among official characters upon grave occasions.

The question and answer were undoubtedly attended with mischievous consequences. Taken up and reported without sufficient consideration, and made the subject of publication in next morning's newspapers, without due carefulness and investigation, they had a tendency, undoubtedly, to increase, if not create, undue suspicion and excitement. How much of the mischief was to be ascribed to this particular cause, and whether it may not have borne more of the blame of what ensued than really belonged to it, may perhaps admit of doubt. There was a mystery attending the circumstances involved in the movements of that day and night, which has never been penetrated, and must be an apology for the obscurity that, more or less, hangs over and clouds them.

The complaint against the mayor was made before the police court on the following afternoon, by three known citizens, upon their respective oaths, — that they had reason to believe, and did believe, that there had been and were intoxicating liquors deposited and kept by Neal Dow, (not named as mayor,) in the middle cellar under the building known as the city hall, in said Portland, — the said Dow not being authorized by law to sell the same in Portland, — intended for sale within the State, in violation of law. These persons were not required to state the grounds of their belief in making the complaint. They were not examined on that point, nor did they undertake to bring forward any evidence to that effect on the final hearing before the court. They did not offer to submit to any examination on the subject. In the wide range of inquiry that was allowed and gone into upon the whole affair afterwards before the second coroner's inquest which was instituted, they were not interrogated. They were invited to attend the committee of citizens designated by vote of the mayor and aldermen to make inquiry into the circumstances antecedent as well as attending the event, for the purpose of giving any information they might think proper, but declined to appear. The subject, therefore, remains destitute of that light which might thus have been cast upon the foundation of complaint, and the grounds and reasons for exhibiting it are left entirely to conjecture. Satisfaction on this point, perhaps, it may not

have been easy to attain; and the inquiry was one which for obvious reasons it might not be deemed expedient to pursue. How the idea got abroad, prior to the conversation that has been referred to, that the negotiation was going on for making the intended purchase, or in what manner it got into circulation, and color was given to it of being contrary to law, or under any false pretence, has not been distinctly made apparent. It does not seem that any privacy was practised in the transaction. At any rate it seems to have transpired immediately upon the arrival of the vessel with her freight from New York, where the purchase was made. Rumors, indeed, preceded the steps that were taken upon that occurrence, of circumstances of which Portland was to be presently the scene; but no sufficient authenticity is attached to any reports of that kind to justify any inference of preconcert beyond a very narrow compass, although it may not still, quite leave the whole of what followed to fall without qualification upon its more prominent and active agencies. Upon what, indeed, the complaint thus made subsequent to the above conversation, and exhibited the same day with the publication referred to, therefore rested, it will be seen, remains entirely unknown. Being made under the solemnity of oath, it should be taken to have been upon some more warrantable ground of information and proceeding, than mere newspaper suggestion or surmise.

It was denied by the alderman who had the lively dialogue with the mayor, that he held any communication with the complainants, although he did not profess to have made any reserve upon it. The thing had begun to be openly talked about, as it appeared, before the complaint was made, that the liquors were to be taken and destroyed, and various opinions expressed upon the probability; although it was hardly thought it would be attempted. Quite a number of persons accompanied the complainants before the police judge, and crowded the court room. They carried an officer with them, whom they had chosen for the service of the warrant when it was given out; and much discontent and disappointment were manifested when it was deemed more proper that it should be delivered to the regular deputy, in the usual manner, for that purpose. It was insisted upon as a matter of rightful demand, and the refusal resented as an act of unjust authority. The warrant was even sought to be wrested from the officer's hands. Means were already

employed, and teams were in readiness at the city hall, to effect the removal and transportation of the liquor, as soon as the warrant should arrive.

A considerable multitude was gathered around at the city hall to witness the process, and a general expectation seemed to prevail among those who were assembled of something extraordinary being about to take place. An increasing impatience was manifested at the delay, and that summary service was not made upon both the liquor and the mayor. Efforts were made in the meantime to explain the circumstances of the purchase, as well as the intention, by officers of the government and police, as they had opportunity; and pains were taken to make known the real state of facts as to what had taken place in regard to the business. The deputy was proceeding in the meanwhile to ascertain and perform what was his duty in the premises; and, according to the advice he received from the county attorney, determined and declared that he should execute the precept, and deal with the case as he should with any other, without making any distinction. The liquor being deposited in the storehouse where it properly should be, and bearing no marks except of belonging to the city, the difficulty was how to distinguish it, or where to remove it, so that the property might be lodged with more convenience and safety. The mayor himself, on being apprized of this sudden proceeding, after giving directions to guard against disorders, was preparing to give security for his own personal appearance on the ensuing Monday, as it was then too late for any further proceedings or hearing upon the warrant the same day; though that precaution was not usually required, when there was no reason to fear the party would not be forthcoming.

When the service of the warrant had been so far completed by the seizure of the liquors, which were taken into the special custody of the deputy, and held to be most secure where they actually were, until further direction should be obtained, a good deal of dissatisfaction was exhibited among those who were waiting outside, and a disposition evinced by threats and declarations among the more eager and active spirits of the assemblage, that the object for which they had come together should not be thus defeated; and, after sundry manifestations of this temper, an adjournment took place, with an understanding, as it proved, that they should collect with more force at an early hour of the evening. Expressions to this effect were

gathered from scattered groups. Word was also passed to individuals going out of town. Two or three unknown persons were met just towards evening at the entrance of one of the bridges, who parted with a bidding to be sure to be in again, at what was called "the rum shop," at eight o'clock. An inhabitant of another neighboring town, well acquainted in the city, passing along through the crowd that afternoon, from all he heard and the temper observed, came to a conclusion as to what was likely to happen in town; which he expressed so strongly, on his return, as to excite the curiosity of some of the junior part of his family to become witnesses of what was going to be the result.

These symptoms of approaching trouble, increasing towards evening, could not escape the attention of the police, although no real apprehension had hitherto been entertained of anything more serious than they had observed in the afternoon. This, however, led the city marshal, who was chief of the police, to take the unusual precaution to provide himself with pistols, and some others were induced to follow his example. They had seen enough to be satisfied that the trouble was not over, and that what had been the scene of difficulty might again become the point of danger. The marshal accordingly considered that to be the post of duty for him, to be at hand for the protection of the city property and the support of his deputy in its special custody. The city regulations require the principal of the police, immediately upon any disturbance, to repair to the spot with a proper force to suppress it. As it was the city agency that was threatened, the marshal thought proper to collect as large a portion of his disposable force as he could spare for the purpose, directing a number to defend the room occupied by his deputy, and distributing others about in stations adjacent and convenient for warding off the danger, and warning the people around of their peril, with orders to induce them to desist and retire.

It is not probable that the object of the gathering in the afternoon extended any farther than to be spectators of the destruction of the liquor under the process about to be obtained, and to render such aid and countenance as might be needed. Nothing was probably looked for but what might have been accomplished without any great resistance. It would have been for the officer who had obtained charge of the warrant to have determined how far he would suffer any interference with the execution of it

in the way he might think fit; and especially on the part of the very person against whom it was directed; and whom he might insist on taking into custody also, and call on all present for support in the legal service of the precept. In this way, to be sure, any legal resistance or hinderance might have been avoided; and the spectacle exhibited of a community deprived of its regular executive head, while its property was given up to waste and destruction. Its peace might have been preserved, so far as might result from paralyzing its conservative power, and danger avoided other than might arise from excesses to be apprehended in the intoxication of such a victory. But that victory could have been obtained, it must be acknowledged, only by a most flagrant abuse of legal process, and a triumphant prostration of civil power.[1]

It is evident that Mr. Dow, the mayor, was taken off his guard, and that the city government was equally unaware, and totally unprepared for any such rising tumult. It is well known that the mayor himself was the object of considerable odium on account of the zeal and activity with which he had undertaken to execute the law of which he was viewed as the author, and some of the most obnoxious provisions of which, he had put in force with unmitigated severity. These feelings had been acquiring depth and strength, to a degree of vindictiveness in some instances, which only required opportunity for explosion: — such as was thought to be afforded by the supposed inadvertence of the mayor to the minute requirements of his own law. This cause imparted a character of personal hostility undoubtedly, to the proceedings of many of the individuals who were concerned, and conduced also to a state of sympathy or passiveness, amounting to encouragement on the part of many more who were inactive, which very much increased the difficulty of dealing with the existing elements of impending trouble and alarm. No demonstration had occurred to suggest the need of any extraordinary precaution for the protection of property and prevention of disorder, and put the authorities more upon the alert against movements succeeding each other so

[1] The *Review*, &c., maintains that the liquor was subject to seizure by reason of not being marked, as required by statute; and that, therefore, Dow ought not to have resisted, but submitted to have put in a plea of not guilty, and contented himself with taking an appeal; and that he should not have opposed the seizure, &c. But it was not disputed, and it was fully acknowledged, whatever might be the defect, that the liquor was the property of the city, and could not be forfeited for any offence of Dow. Dow was afterwards tried upon the complaint and acquitted, and no further proceedings had.

rapidly. So far as there might have been any previous concert or design of this kind, it was certainly so far successful, that the authorities were taken altogether by surprise, and may be entitled to all the apology that may be derived for the course they were compelled to, under the circumstances. But there is no sufficient evidence, nor does any strong presumption arise from the course of these events, of any such absolutely premeditated design. The emergency was one that sprung up of a sudden, and the danger existed in the temper and disposition of the more ill-inclined portion of the multitude assembled on the occasion. It was a sort of volcanic movement, arising from the defeat of violent purposes, furiously turned in another more uncontrollable direction.

There had been a special meeting called of the board of mayor and aldermen that afternoon, on some business relating to the agency; and a hasty majority was obtained just at the edge of the evening, upon the tidings of what was taking place about the city hall. The impression of this intelligence was confirmed by the city solicitor, who had been led by the interest he took, to observe what was going on there at that hour. Gen. Fessenden thought it his duty, after making this tour, to visit and advise them of the threatening appearances, and of the necessity there was, in his opinion, of taking strenuous measures for the prevention of outrage and maintenance of peace and order.

Upon the inquiry of Gen. Fessenden, whether there was any military preparation to meet the emergency, he was informed that there were precautionary measures which had been, or were about to be, adopted. These referred to the arrangements that had been entered into by the municipal government upon the abandonment of the old militia system and the substitution of the voluntary principle; and cities being thereby left to make their own contracts with volunteer corps for performance of such extra police services. Armories were desired to be furnished by the city; for one of which the upper part of the city hall was fitted up at some expense; and an agreement was entered into, commencing with a company existing, commanded by Capt. Anderson, soon after the alteration and repeal, by the terms of which it engaged to act as an auxiliary corps to the police, as well as to perform escort duty, whenever it should be required. This was under the mayoralty of Mr. Cahoon. A further pecuniary compensation

was stipulated; and the agreement was also extended to one or two other companies upon similar conditions and considerations. An early occasion for employment of this particular force occurred in dispersing a riotous gathering upon the summit of the city some few years since, and preventing the destruction of a disorderly house. The requisition made in that case was promptly obeyed, the service successfully accomplished, and suitable acknowledgment rendered.

The arrangement, which had proved so satisfactory to all parties, was renewed on the eve of the last municipal administration with several of the volunteer corps, among which were the Light Guards, commanded by Capt. Green, and the Rifle Guards, by Capt. Roberts. The former occupied the armory mentioned over the city hall. That of the other was in a situation more remote.

Upon the sudden pressure of the present occasion, these two last companies were speedily called out, upon a message from the mayor, conveyed by an alderman and other messengers to the commanders and members. Some hesitation being manifested without having a regular order in writing, the old statute was hastily turned to, and the form given there was copied, without adverting to the fact of its having been repealed. It was undoubtedly as good a form as could be adopted, and answered the purpose, although issued in a style somewhat supererogatory; and at the utmost, so far as related to that statute, simply nugatory. No further difficulty or objection was however made, and the orders that were received were, in so far meeting that scruple, generally obeyed.

It was subsequently suggested and argued that the act giving the form being repealed, the order was void, and the calling out the military companies by the mayor illegal. The obligation, however, consisted in the agreement, and was not created under statute. All that was necessary was that the companies should be notified; and it was enough that they should appear accordingly. All the rest was rubbish. There was no time to stand upon ceremony.— Before coming to that measure, however, we must take a view of the steps taken previous to its employment, and of the aspect and conduct of what must now be called the mob.

One very proper step taken at this early period of the evening, by the mayor and what aldermen were together was, to send for the sheriff of the county, who was in the

city, and upon whom it devolved, equally with the municipal authorities, to suppress any tumult, being authorized to call upon the whole *posse* of the community for the purpose of keeping the peace, and he was requested to render his official co-operation and assistance. The principal duty might have been indeed devolved on him; and it may be regretted that he had not one or more deputies at hand, and felt himself empowered to assume and exercise a greater portion of active responsibility. He promptly answered the summons, and, together with the city solicitor, directly repaired to the scene of excitement, to attend to what was expected of him.

Upon the arrival of Sheriff Baker and Gen. Fessenden at the city hall, they found it surrounded by an increasing number of men and boys, chiefly the former, who kept more in the back ground, — the latter being put more forward in the beginning, — but of all ages; those of a more known and suspicious character taking care to avoid the recognition of the officers and members of the police and others of whom they were jealous, as much as possible, and not to afford any direct occasion for observation and arrest. Some of this class were noticed to be circulating, and mixing in squads which were moving about from one part to another, while others, a more considerable number, and among the older, kept more cautiously aloof, and appeared to take a more passive and quiet interest in these operations. Some who seemed slow and inactive while policemen and their assistants that could be distinguished, or who were suspected as such, although without badges, were near, — when those were withdrawn, entered again into the renewed stir and zeal of the commotion; and it was very difficult to distinguish many of those who were really among the more active spirits of the occasion, from the adroitness with which they would contrive to elude casual or even vigilant observation, and the air which they maintained of indifference and reserve, from those who manifested greater eagerness and made themselves more conspicuous objects.

The principal collection had begun to be formed upon the northwest side of the building on Congress street; and missiles, mingled with threats and outcries, began already to be hurled at the door and window of the store in considerable abundance. The police and other well disposed persons vainly endeavored to prevail upon those whom they saw or who seemed to be concerned in the dis-

turbance, to desist and withdraw, warning them as well as all others, of the danger to which they were exposing themselves, and informing them that those within were armed to resist any violent attack. These pains were lost upon most of those upon whom they were exerted; and the appeals were answered, in most instances, by curses and menaces, derision and abuse.

Surprise has been signified, and fault has been found, that arrests were not made at this period and during the earlier part of these tumultuous proceedings. This was attempted in several instances; but the scattered force that could be employed was scarcely equal to the combined numbers which would be instantly opposed, and which exerted themselves with more boldness and effect, as daylight disappeared, and the mask of night came on to defeat every effort of that kind. If a boy was seized in the act of throwing a stone it was remarkable to see the dexterity with which he would be extricated from the hands of the policeman. The difficulty was increased still more in case it was a man, who had made himself too active to be overlooked. A phalanx would instantly be formed around, and a rescue effected, by a skilful manœuvre in separating the persons, or some act of more or less determined violence. It would have taken many to master one; and in the increasing turbulence and temper of the more violent and busy portion of the multitude, and the increased strength they were acquiring in the ripening process of the riot, it would have been a task for the whole strength of the police that could have been employed, without leaving the place of assault entirely undefended, to have secured the accomplishment of a single object of this kind; and its success, so far as it can be so called, would probably have been only the signal of a more general conflict.

Things went on at this rate, the cry being kept up on the outside, and stones continuing to be thrown, together with other missiles, at the agency, — the shutters of which were not entirely closed, breaking through the windows and occasionally hitting the police officers within, until after nine o'clock. About a quarter past that hour, the bells were set ringing as for an alarm of fire. This motion proceeded from one of the police who felt themselves in peril, without any order or suggestion from any superior, and appears to have been done in the vain expectation of either drawing off the throng or of summoning the well-disposed to their relief and assistance. Some slight diversion may

have been occasioned by one or two fire engines coming on to the ground, and stopping a few moments; but the onset was only renewed with more vigor upon their disappearance; and the circumstance probably had no other tendency than to increase the tumult.

The situation of the agency, it will be recollected, was upon two opposite and nearly parallel streets, having double assailable points. The south store contiguous to the agency, under the same exposure, was made use of as a rendezvous for the police and others acting with them outside — with a communication for the voice through the partition wall. That room was kept lighted up as a protection to the marshal and police, while the gaslight had been lowered in the agency. Against this the resentment of the mob also seemed to be no less raised; and calls were loudly made to put out the light. The occupant and party in possession of this adjacent store, it may be mentioned, were finally driven out. It was through this channel that the word for ringing the alarm bell was conveyed.

Affairs by this time had begun to wear a most alarming and violent aspect. The scene about the city hall was becoming every moment more menacing and portentous. The throwing of stones and other things, which seemed chiefly to come from the more youthful part, as long as operations were distinctly visible, now seemed to have gone more into other and older hands, which assumed the work that belonged to them with steady toil and perseverance. The number actually engaged, at first more scant and limited, and less enterprising, now swelled with the more active and bold and turbulent, at no time exceeded one or at the most two hundred. But the mass appeared to become more excited and compact, and actuated by one spirit. The voices became louder, as larger and heavier missiles were hurled upon the Congress street side of the edifice; and the successive volleys that were discharged, were accompanied or followed by repeated and prolonged shouts that were heard to a greater distance and appeared to come up from the body of the whole crowd. "Nothing," said General Fessenden in giving his testimony before the inquest, "was so alarming as these shouts!" This overpowering and unrestrained expression indeed of the temper of the whole multitude, was certainly one of the most significant and terrific symptoms of its composition and character.

The power of the police had now almost ceased, any

further than to defend themselves and protect the property in the agency. This position, together with the situation of the marshal and his party within, has been described. The knowledge that those inside were in part armed, served to stimulate the violence outside and increase the danger. Had the place been left vacant, or the force weakened by venturing out to repel assault, it would have been instantly occupied, and a close conflict brought on. A sally on one side would have been attended by a rush on the other, with little doubt of the immediate consequences which would have ensued. The numbers were too disproportionate.

In the meantime, a portion of the Light Guards had collected in their armory above, and after some little demur on the part of their orderly officer, and reluctance manifested by some others with which there was not much time to parley, the mayor finally succeeded in prevailing upon the captain, who with some portion — little more than a dozen — of the company, with their muskets charged and bayonets fixed, without their orderly, and accompanied by the sheriff and one of the aldermen, proceeded down the steps leading to the north side of the City Hall, and drew up the men. The sheriff, here standing upon an elevation, made the proclamation prescribed by the Riot Act, in the name of the State, for the crowd peaceably to disperse and retire. This was done in a loud and commanding voice, which, although drowned in the shouts of the more immediate throng about them, was audibly distinguished at a considerable distance. The same command was repeated in a similar voice by the mayor, who then took his station with the alderman by the captain, at the head of his section. The crowd opposed showed no signs of giving way, and the missiles were now directed against them and their pieces, several being hit with stones, and one of the men knocked down and carried off senseless. It was suggested to the captain to charge upon the mob in front; but for that, he replied, that he had not a sufficient force. He expected to have been joined by a larger. If he had the whole of his company out, he thought he should not have been unwilling to make the effort. In this trying position, the men becoming uneasy, and the missiles and outcries kept up, the captain demanded what should be done, — the men could not stand it much longer. The mayor, the alderman standing beside him, soon gave him an order, in a loud voice, to fire. The order was, to fire by platoons from left to right. It was given by the

mayor, to be repeated by the captain. Some of the men brought their pieces to a poise, and stood in attitude for the final order. This not producing the effect, that might have been hoped, the alderman evincing indecision and the captain unwillingness to execute the order by firing upon his fellow-citizens, the mayor paused and ordered him to wait awhile, and he would be joined by the other company that was coming. The men, however, becoming more impatient and restive under the usage of the mob, one after another being knocked down, and it taking two to take care of every disabled one carried off, the mayor saw no mode but to give the desired permission to march off to meet their approaching auxiliaries. In executing this movement, nearly the whole military party disappeared. The Light Guards, having deposited their muskets back in the armory, when the Rifle Guards arrived, being destitute of ammunition, they were marched up into the armory to be supplied; the mayor directing them to take the loaded arms which were just returned by the Light Guards.

Objections being raised and an unseasonable debate arising in regard to giving this permission, the captain of the Light Guards proposed to put it to vote; when the mayor put an end to the debate by a positive demand. This this may be viewed as an act of consideration towards the recusants themselves, by relieving them from the awkward predicament of refusing the use of arms, which they were themselves backward to use, to those who were ready to employ them according to the engagement. The mayor might well be excused for the exertion of a little active authority at this crisis, and have been called to account for any weak temporizing and delay. Some time was necessarily taken up in this altercation, before the Rifle Guards could be needfully equipped and got ready to act.

Upon the retreat of the Light Guards, the assault upon the agency was renewed with increased exasperation, and a state of things occurred to which it is time that we now turn our final attention.

In the early part of the evening, there did not appear to be any ringleader. It was not until after the bells rung the alarm, that the person called John Robbins, who was afterwards killed, became conspicuous, and rendered himself prominent by his violence of language and conduct; so much so that he was urged and prevailed upon to retire or keep back for a short time. But his impatience soon

got the better of him, and he was again seen among the foremost.

Warning had been repeatedly given to the mob that the police within was armed, and would certainly fire upon the first that should attempt to enter. The directions given by the marshal were positive and distinct, not to fire until such an entry should be made, or should be on the point of succeeding. Undeterred by these declarations, they were only replied to by fiercer threats, and more daring acts and demonstrations. The attack upon the agency was kept up with redoubled force. Robbins was seen standing with his back against the door, kicking against it with great violence, and calling upon his companions and followers to "close round him." This was witnessed, and the positive testimony confirmed, without. Within, a voice was heard from outside, high above the rest, cheering and urging them forward with language of mingled encouragement, reproach, and defiance. Those within were called cowards; that they dared not fire. Those outside, with the same epithets and oaths, that they dared not come on. In the midst of all this, an arm was seen thrust through a broken part of the door; a hand was reached down to remove the lower bar which secured what remained of it inside; and a person was seen forcing his way into the entrance, and, as some described it, half through the doorway itself. This was thought by those inside to be the head of the assailing force. A distinct warning was given to this person by the marshal, if he did not retreat he would instantly be shot. The warning was unheeded. The marshal and his deputy first presented their pistols. They were raised above the head, and discharged to no other purpose than to excite the cry of "blank cartridges," with an oath, — "the way is clear, rush on!" — and the exclamation, "I will either go through or go to hell." The door was now burst, and giving way before him, the bar still in his hand, and the body entering or entered. The marshal waited no longer. Upon a second or third pistol shot this leader fell. He was lifted as he fell, and his body borne off in the arms of the nearest supporters. The cry arose without, and was repeated, that a "man was shot," "a man was killed," and, finally, "that he was dead." At any rate, the voice was heard no more. This was also beheld from the windows of the hall above, and directly over the agency, as well as attested

by those around, and who entertained no doubt of the fact.

The assault, though slackened for a moment by this occurrence, was still kept up with unabated rage, the mob keeping up their efforts to effect an entrance through the nearly demolished door, which opposed but a slender and doubtful resistance; and the most savage exclamations were uttered of vengeance and desperation. If the leader was struck down, his place appeared to be instantly supplied; and if that was not Robbins, as a witness, who thought he recognized him still, supposed, the alternative conclusion must be that he remained carrying on, if not actually heading, the assault.

It was now more than half past ten, drawing to within fifteen or twenty minutes of eleven o'clock. The number of people collected was reckoned variously from many hundred to one or two thousand, and even more. The sheriff, from his account, was the last person who could be suspected of exaggerating. It filled the spacious area north of the city hall. The resistance of the police increased the violence of the assailants, which was inflamed by the fall of their daring and active leader, and by the wounding of several others from the continued firing of the police. Some were badly wounded by the mob themselves in their struggles and confusion. Fresh materials were brought from further places, around blocks recently built or building. A store was near at hand, containing implements such as pickaxes and crowbars, &c., which was threatened to be broken into for a supply. The shattered door and window of the agency, but partly closed and held or kept shut, underwent a constant battery. A heavy piece of timber was first brought up to be used as a battering-ram, and when that was dropped for a better, a stout hooped barrel was made use of to make a breach in the window, with more force and success. Liquor was circulated and administered freely among those most actively engaged. Pistols were discharged among the multitude towards it and the store next to it, from which the assistant party to the police was expelled. This firing of pistols from the mob was shown by as ample evidence as went to establish any other facts; that within was kept up with the assaults from without; and more than one of the wounded among themselves, one way and another, were already carried off by them. The tumult was now at its height. The attack had been now kept up for more

than two, and nearly three hours, upon the small body pent within the building, — consisting of not more than seven or eight, — which had been defending themselves, by the continued discharges at or through the broken parts of the entrance; for the whole space was filled with dense smoke, through which they were scarcely able to distinguish; until their ammunition was nearly all spent, and the police was falling back, barely able to keep the assailants at bay. One after another was struck or disabled. As a last resort, the marshal contemplated taking refuge in the cellar, and there maintaining his desperate defence. At the last moment, when the other company was just about coming to their relief, to increase the darkness and danger, the street lamps at the corner of the city hall, by the steps they were to descend, were suddenly extinguished, in quick succession; and an individual was seized in the act of dismounting the lamp-post.

At this appalling crisis, one of the aldermen, who had been long observing and exerting himself without, Mr. Libby, went into the armory, and representing that the police would not possibly be able to hold out much longer, earnestly urged that no time should be lost in going to their assistance. The report was repeated that the police was on the point of being overpowered; and the company of Rifle Guards, now equipped with muskets, bayonets and ammunition, was entreated to be expeditious.

It was eleven o'clock when the Rifle Guards marched down, and into the agency, and after eleven when they began to fire. They were headed by the mayor, with two of the aldermen. They entered by the door on Middle street, eighteen or twenty in number. The first thing that was done by the mayor, was again to call on the mob to disperse and retire. It was too late, and there was too much tumult to let a voice of that kind be heard. No signs were shown of giving way, but the storming was still continued, and the pressure unslackened. The mayor then gave the direction to fire. The word of command came directly from him. They were ordered to advance and fire in sections of four, and fall back. The orders were promptly obeyed, and three volleys were successively discharged. Stones were returned, striking the men, and knocking one of them down. The tumultuous shoutings were kept up, the shocks from without were unintermitted, and it was testified that at the different discharges of musketry there were simultaneous "battings" heard against the

door. This was testimony of what took place upon the outside; but the confusion was such between some of the statements of the firing, by the police and the soldiery, that it is difficult to discriminate in some particulars with precision. Those who were most actively engaged on the Congress street side were not so well aware when the Rifle Guards entered upon the other; and it is very evident that several witnesses were not able to distinguish between the periods. Some of them might have been too much engaged themselves to afford very reliable testimony.

After three or four discharges to clear the passage, the men were drawn back into Middle street, and the gas was lighted up in the agency. This was to let the assailants see in, and those who were within ascertain, as well as they could for the smoke, what was the situation of things. A space was perceived outside, which the few discharges continuing to be made with the muskets served to keep clear, and in a short time to disperse the immediate throng. The mayor and one or two of the aldermen then passed round to see the effect of the last measure; and a few charges ordered upon the scattering and diminishing mob that were now lingering, or making a brief stand about in squads, and ceasing to oppose any longer resistance, completely put an end to the riot. The firing commenced a few moments past eleven, and was all over in a very few minutes.

It must be confessed that there is some difficulty in observing the exact order of some of these details; to be accounted for under the excitement and agitation of the circumstances, and the apparent conflict, or rather confusion, prevailing in the statements of the most honest and unimpeachable witnesses. Something of this character marks the two leading publications prefixed to this article; the one the reported evidence before the coroner's inquest, the other the report of the investigating committee. The latter seems to have regarded its labor as brought to a close, when it came to the conclusion that Robbins was shot by the pistol fire of the police. The other does not consider its own to cease until it has established the fact that he was killed by the military company, and brought that fact home to the conviction of the mayor, Mr. Dow, of a felony.

This was not of very material consequence, one way or the other. The report of the investigating committee admits that the mayor "instructed the chief of police to

station a portion of his force in the agency room, armed, to protect the public property at all hazards." The proclamation required by the "Riot Act" had been made more than once by the mayor, as well as the sheriff. Words are sometimes things. Armed with the provisions of that act, when they are complied with, and those solemn words are pronounced, the law becomes altered, and the felonious character is at once fixed on the illegal resistance to those who are acting under the necessity of preserving order at peril of their lives. The crime consists in assaulting those who have the ægis of authority, and are exposed to unlawful violence. With the arms placed in their hands by the sternest requirements, it would be too severe a responsibility to demand of those intrusted with such critical and momentous concerns any further justification than their own best discretion in the use of them. It is the opposition they encounter that incurs the penalties of law.

It was currently reported and believed that night, and for a day or two after, that two persons were killed, besides a number wounded. And when it is considered how long the firing was kept up by the police, and how steadily followed by the musketry, it is wonderful that no more should have suffered. Several bodies were borne away, apparently lifeless; two of them supposed to be dead. Mysterious circumstances attached to the removal and disposal of one or two that were carried off, and about which no noise was ever made; and of one in particular, never quite penetrated nor cleared up. Rumors of this kind can hardly be said to have ceased, until it came to be made an issue upon the single death of Robbins, and contended that he was the only fatal victim of the firing.

The reason that no more execution was done, by the latter especially, probably was, that the fire from the inside was confined within a single direction, — straight forward at and through the agency north door, — and that the mob outside gave way somewhat on either side to keep clear of it. It fell chiefly, of course, upon the more violent and desperate. There was some evidence before the inquest making it doubtful whether there was not another person, at the outset equally active with Robbins, who was shot down by the police, and never afterwards heard of. It was very remarkable that more pains should not have been used to ascertain whose body was first borne off, if it was not that of Robbins, and what actually became of one who had made himself so active and prominent. The

weight of evidence in the minds of the committee, from their report, unquestionably was, that the body of Robbins was carried off, and after several turns, and calls at the doors of a number of physicians, finally reached the Elm House, and was deposited, near eleven o'clock, before the firing of the musketry actually commenced; and the more reliable part of the testimony certainly would lead to that conclusion. Credible witnesses testified positively to consulting timepieces, and hearing the clock strike at eleven, — after the body was proved to have been conveyed to where it was at last left, — in time even for those who were engaged in doing it to indulge an eager curiosity in getting back before the firing of the Rifle Guards began. The inquiry, however, resolves itself very much into testimony as to time, in respect to which there is often so much difficulty, and in the heat and agitation that prevailed, at this period, considerable embarrassment and confusion.

The *corpus* of the affair was very clearly established. Upon that there was no question. Authority was vindicated and order restored, though at a severe and painful cost. The exact point of the death of Robbins could only be determined by a judicial investigation, which the grand inquest of the county refused to institute. Opinions were divided, and passions excited. Upon the principles applied, and the evidence proper to be laid before it, it is difficult to see how a bill could be found, or an indictment maintained, against any but those concerned in the riot, and those who, being properly notified, neglected and failed to perform the duty enjoined, or who remained and refused to take part in suppressing it.

Note. — There was evidence from a somewhat imperfect post mortem examination tending to show that Robbins was killed by a musket shot; but no accurate or seasonable inquiry was instituted into that point, and the examination, such as it was, was not very scientific or satisfactory; and the testimony very far from being conclusive. After all that was brought out by the diligence of the second coroner's inquest, or that of the investigating committee, it is difficult to see how any result could have been more sensible, prudent, or correct, at the time, than that which was come to by the original inquest held upon the body before them, the week ensuing, and which was in these words; viz. —

"That John Robbins came to his death by a gunshot wound, a musket, pistol, or revolver ball, shot through his body by some person unknown to the inquest, acting under the authority and order of the mayor and aldermen of the city of Portland, in defence of the city property from the ravages of an excited mob, unlawfully congregated for that purpose near the city hall, on Saturday evening, June 2d, 1855, of which the said John Robbins was proved to be one."

Recent American Decisions.

Circuit Court of the United States for the District of Massachusetts. May, 1855.

LATHROP L. STURGIS, ET AL. *v.* THOS. G. CARY, ET AL.

General Average — Usage.

The rule laid down in *Barnard* v. *Adams*, 10 Howard, 270, that the ship owner is entitled to a commission upon the amount contributed for in general average, is not founded on a local usage, but upon the law merchant; and a particular local usage in contravention thereof is not binding.

CURTIS, J. — At the last term, the complainants had a decree that they were entitled to contribution from the respondents, towards a general average loss, and the cause was referred to a master to take an account, and report the several sums to be contributed by the defendants.

He has now made his report, and one exception has been taken thereto; which raises the question whether the owners of the vessel are entitled to charge, among the items to be contributed for in general average, a commission of two and one-half per centum on the amount of the general average loss, to be paid to the owners of the vessel and freight, as a compensation for collecting the contributory shares.

This charge was disallowed by the master, upon the ground that the decision of the Supreme Court of the United States in *Barnard, et al.* v. *Adams, et al.*, 10 How. 270, allowing a similar charge, rested upon a local usage in New York, and that it appeared in evidence before him that the usage in Boston was not to allow such a charge.

The language of Mr. Justice GRIER, in delivering the opinion of the court in that case, is susceptible of the interpretation put upon it by the master, and the statement of the case in the printed report does not show how the point arose, or upon what facts it came before the court. I have procured a copy of the record, and find that at the trial in the Circuit Court no evidence of any usage, local or general, was offered; that the presiding judge instructed

the jury, as matter of law, that the charge was correct, and that this instruction was excepted to. The Supreme Court sustained this ruling. I must take it therefore to be settled by an authority which is binding on this court, that under the general law merchant the ship-owner has the right to make this charge, and upon this state of the law, a question, not without difficulty, arises in this case; it is whether the local usage in Boston, not to allow such a charge, can control the rights of these complainants.

There is no doubt that contribution is to be made and the items which form the amount to be contributed are to be ascertained and allowed according to the law of the place where the adjustment is required by law to be made, which in this case was Boston, the port of destination. But does a local usage of that particular port, in opposition to the general rule of the law merchant, form one of the legal rules for adjusting a general average loss at that port.

Local usages sometimes have a binding effect, even when they are not in conformity with general rules of law, provided they are not unreasonable in themselves. But this effect is allowed to them upon the ground that parties have the right to renounce the benefit of a rule of law and to contract in reference to a different rule; and where the usage is so general that the parties must be presumed to have contracted in reference to it, or where it so affected the subject-matter of the contract that both were reasonably bound to know the usage, their consent to be bound by it and to waive the rule of law is implied in many cases. But these, so far as I know, are all cases of contract; and I cannot understand how the necessary foundation of a presumed consent, can be laid in any other case.

But this right to contribution does not arise from contract. It depends upon a principle of natural justice, that they who have received a common benefit from a sacrifice voluntarily made by one engaged in a common adventure should unite to make good the loss which that sacrifice occasioned. Emerigon says, (vol. 1, p. 587,) "Equity requires that they whose effects have been preserved by the loss of another's merchandise, should contribute to the damage," and he cites a passage from the Digest which places the right solely upon the ground of its equity.

In *Deering* v. *The Earl of Winchelsea*, 2 B. & P. 270, S. C. 1 Cox, 318, Lord Chief Baron Eyre examined this

subject of contribution with much ability, and came to the conclusion that "the bottom of contribution is a fixed principle of justice, and is not founded on contract." So Mr. Justice STORY has declared, (1 Sto. Eq. Jur. § 490,) speaking of general average —"the principle upon which this contribution is founded, is not the result of contract, but has its origin in the plain dictates of natural law."

This being so, I cannot perceive upon what ground I can declare that these complainants have consented to waive the benefit of a rule of law which I must consider exists in Boston, as well as in New York, and all other ports in the United States. It is true this rule is said by the Supreme Court to rest upon the usage and custom of merchants and average brokers. But the same might be said of a large part of those rules of the commercial law which are as well settled and as constantly administered by the courts, as any statutes enacted by the legislature. It seems to me also, that if, as the Supreme Court declare, it is a duty thrown on the ship-owner, by the common disaster, to collect and pay the contributions, a usage not to indemnify him for discharging this troublesome duty, would not be consistent with the principle which requires contribution to be made; and it would be difficult to sustain its reasonableness. See *Eager* v. *The Atlas Ins. Co.* 14 Pick. 141; *Gallatin* v. *Bradford*, 1 Bibb's R. 209; *Kendall* v. *Russell*, 5 Dana's R. 501; *Whitesides* v. *Meredith*, 3 Yeates's R. 318.

It was urged that a commission of two and one-half per cent. on the whole amount of the general average contributions, to be paid in every case, was a disproportional, and in many cases would be an excessive charge. This may be sometimes true, as it is sometimes true in all business in which a fixed rate of commission is paid *pro opere et labore*. But the practice of merchants to make and receive compensation for services by a fixed rate of commission is almost universal, and must be deemed to be on the whole just and equal in its general operation, or it would not have thus obtained. It may be added also that it has been adopted by the legislation of this country in a great many cases.

It was also objected that in the adjustment presented to the master by the complainants, this charge was set down as to be allowed to the complainants' agents. It was explained that the complainants, residing in another State did not personally attend to this business, but employ-

ed agents to do it for them, and this was the reason of the form of the charge. It does not seem to me that the form is important. The allowance is to be made to the complainants for their services; if they choose to specify, when they claim it, that these services were rendered by them through agents, and, therefore, ask that it may be allowed for the services of their agents, instead of saying for their own services through their agents, there is a deviation from the true form, but the substance is not materially wrong.

The exception to the master's report must be allowed, and the report corrected by adding this item.

F. C. Loring, for the exception.

R. Fletcher, *contrà*.

United States District Court. In Admiralty.

EDWARD WAPE, ET AL. *v.* AUGUSTUS HEMENWAY.

Shipping articles, construction of — Seamen, imprisonment of — Mistake as to right of, effect of.

If a clause in shipping articles is ambiguous or susceptible of two constructions, one favorable and the other unfavorable to the seamen, the construction favorable to seamen shall be adopted, it not being their fault that the owners did not make the articles clear.

In a shipping paper, the words, "voyage from Boston to Valparaiso or other parts of the Pacific Ocean, at and from thence home direct or via ports in East Indies or Europe," do not describe a voyage with sufficient certainty within U. S. statutes made for the protection of seamen, and do not bind the seamen to service after arrival at Valparaiso.

If seamen, from an honest mistake of their right to a discharge, peacefully refuse labor, it will not justify their imprisonment on shore.

THIS was a case for seamen's wages. Libellants were respectable men, natives of Sweden, were going to California, and had partly engaged a direct passage to San Francisco. A shipping master from Mr. Hemenway called at their boarding house in Boston, and offered them wages to go to Valparaiso in the ship Loo Choo, as seamen. He told them they had better earn wages to Valparaiso, and they could always easily get a passage from Valparaiso to San Francisco. Libellants went and looked at

the ship and her accommodations, and after conferring together, concluded to go in her. Upon returning to the boarding house, the shipping master produced the shipping paper for them to sign. The men hesitated, and refused to sign unless a stipulation should be put in that they should be discharged upon arrival at Valparaiso. The shipping master told them that they were green; that they would be discharged there. They replied they knew they were green, but they feared difficulty if the articles did not express the agreement. The shipping master then said he would write it in the articles if that would satisfy them, and taking a pen he wrote upon the paper, when they signed it, joined the vessel, and continued on board till her arrival at Valparaiso. In the meantime, there was mutual good feeling and satisfaction in every particular between the officers and these men. Having moored the ship and made everything snug on board in the harbor of Valparaiso, they packed up their clothes, dressed themselves, and asked (as the chief mate said) respectfully to be discharged and paid off. The captain refused to discharge them. They reminded him that such was their agreement, and referred him to the articles. The captain produced the articles, and the seamen pointed out to him the clause (against these six seamen's names) to which they had alluded, which was discovered to read thus,— "*Monthly* 14, *and to have* 15 *if he perform the voyage and return in the ship to Boston.*" But the captain finally decided that he would not discharge them. The seamen asked to see the consul. The captain went and brought to them the consul's clerk, the consul being absent, who read the articles to the men; and when he came to this clause he said, "Captain, I can do nothing with these men; you have got two rates of wages in the alternative on your articles;" yet, he said, the captain had power to discharge them if he would. After declining to do anything officially, he told the men they had better continue with the ship; but they refused, and the captain refused to discharge them. The clerk then asked the captain if he could be of any service to him, and what he was going to do with the men, and the captain asked the clerk to get them put in prison for him.

The seamen persisting in refusing further duty on board, were committed to prison without being allowed to take any change of clothes. They were kept in prison thirty-five days; one day each in solitary confinement in separate

cells, and thirty-four days in a prison room about thirty feet long and twenty feet wide, having two grating windows, besides a grating door, its only passage for air and light. Here they were incarcerated thirty-four days, in company with all sorts of criminals, afflicted with various and loathsome diseases, numbering never less than one hundred, and part of the time over two hundred, crowded into the same room so thickly as to be unable part of the time to lie down, and having no berths, beds, nor bedding. The food consisted of bread, and a peculiar mixture of Chili beans, peas, barley, and Chili pepper, &c., mixed up together. Once a day, each morning, each seaman was served with bread, equal to a sea biscuit in quantity, with water and nothing else. And once a day, each evening, the pepper mixture was served out in little iron kettles, holding about a gallon each. One of these kettles full was allowed to ten prisoners, and nothing else. Nothing to eat with but their hands, nor anything else with which to scoop it out of the kettle. The Chili pepper mixture was perfectly unpalatable to the libellants, who abstained from eating it until they found the allowance of bread alone insufficient to sustain life; and as soon as they did eat the said Chili pepper mixture, all but one of libellants became sick, two of them prostrated with sickness for days, and swelled up, and unable to rise up at all. They were not able to get an interview with the consul while in prison, and no interview with the captain till a day or two before they were taken out, when the captain called for a moment at the grating and spoke to one of them, but left before the others could make their way to the grating. At the expiration of thirty-five days, the libellants were taken out of prison and put on board the vessel. They were then covered with vermin.

They asked to see the consul himself, who was then at home, but were refused; and still refusing to go in the vessel, three of them were put in irons, with arms suspended above a span around a stanchion between decks, and deprived of food about thirty-six hours, when they consented to turn to, and thence they continued faithfully at service until the vessel arrived in Boston, submitting to perform their duty to the entire satisfaction of the officers during the remainder of the voyage. As to the aforesaid clause in the articles on which the seamen relied, as providing for their discharge at Valparaiso, the defendant produced his shipping master, who swore that he wrote

that clause in one set of the articles in Mr. Hemenway's office, by the special direction of Mr. Hemenway, and that this was so written on the articles over the seamen's names, after they had signed the same articles, and had gone aboard the vessel. It further appeared in evidence from the articles that the voyage therein described was in these words: — "Voyage from Boston to Valparaiso and other ports in the Pacific Ocean, at and from thence home direct or via ports in the East Indies or Europe."

The opinion of the court, by SPRAGUE, J., was substantially as follows: —

This is a libel for seamen's wages on a voyage from Boston to Valparaiso and back. That the services were rendered is not denied. But the defendant insists that deduction should be made for the expenses of the imprisonment of the libellants at Valparaiso. The libellants contend that that imprisonment was unlawful, and they present three distinct grounds of illegality.

1st. That by the express agreement made at the time they shipped, they were to be discharged at Valparaiso.

2d. That the shipping articles do not describe the voyage as required by the laws of the United States, and the master had no right to detain them after arriving at Valparaiso.

3d. That even if the master had a right to detain them, he had no right to imprison them on shore in a foreign country.

1st. What was the contract when these men shipped at Boston. Six witnesses swear positively that the contract was, that the libellants should be discharged at Valparaiso, and that, when the shipping articles were signed, they insisted that an entry of that fact should be made upon them, and that the shipping master then wrote something upon the articles which he said would show their right to such discharge. Against this there is only one witness, the shipping master himself, who denies that there was any such agreement.

In weighing this testimony, it is to be considered that five of the witnesses for the libellant are seamen having an interest in this question, and swearing for each other; and their testimony is to be closely scrutinized and received with great caution; but, upon the strictest scrutiny, they have testified with great consistency, with apparent frankness, and more than ordinary intelligence for men of their class. The other witness for the libellants was a

landlord with whom they boarded at the time they shipped. He may have sympathy for the libellants, but it does not appear to have any interest to bias his testimony.

The sole witness for the respondent is his agent, the shipping master. His conduct is in question, and his explanation of an entry made by him on the shipping articles is not satisfactory. His testimony would not outweigh that of the landlord alone. But, besides this, there are two circumstances that go to corroborate the testimony of the plaintiff's witnesses.

The first is, that, after having fully and faithfully performed their duty until the arrival of the ship at Valparaiso, they at once confidently claimed their discharge as a matter of right, which, being refused, they immediately referred to the shipping articles then in possession of the master, as showing their right to be discharged. These articles they had never seen after they were signed, and yet instantly and confidently appealed to them as decisive in their favor.

2d. The other circumstance is the unusual entry which is found upon the articles, upon their production.

These articles were prepared by the shipping master for the officers and rest of the crew, as well as the libellants.

In the usual column, against the names of the seamen were the figures 14 as their monthly wages, and opposite to their names, in the blank space, was made this entry: "To have $15 per month if he performs the voyage in the ship and returns to Boston." That entry is a part of the written contract. It contains a condition of, "if he shall perform," &c.

The respondent insists that the contract was absolute. If so, why was this condition written upon the articles? The entry was made by the respondent's agent in such language as he chose to adopt. It was made for the purpose of satisfying the seamen that they would be discharged at Valparaiso, and if the shipping master did not intend that it should express that right, it was a fraud upon them. He might have made it in language clear and explicit, if he has not done so; but, if left ambiguous, the seamen are not to be prejudiced by such ambiguity. Upon the whole evidence, it is satisfactorily shown that the seamen were entitled by contract to their discharge at Valparaiso.

2d. As to the second ground, viz., to the insufficiency of the article. Upon examining the description of the voyage

therein contained, it is evident that it gives to the owner and master of the vessel such a power over the seamen as is inconsistent with the provisions of the statutes of the United States intended for their protection; and for that reason the seamen would not have been bound by the articles to any service after arriving at Valparaiso. On both these grounds, therefore, any coercion of the master to compel the performance of duty at Valparaiso was illegal.

3d. But even if the seamen had mistaken their right, and were bound to perform duty, the master had no right to send them to a prison on shore, and especially to such a prison. These men merely claimed their discharge, and refused further labor on the ground of right. They did so peacefully and respectfully; there were no threats or intimations of force; if it was necessary to restrain or imprison them, it should have been done on board the vessel, as it might have been without danger, and where they would have been under the eye of their own officers. In such case the law does not allow the master to thrust his men into a foreign jail, and there expose them to all the privations, sufferings, and hazards of disease. Upon all these grounds the imprisonment of the libellants was unlawful, and they cannot be required to pay the expense of such imprisonment. Decree for the libellants.

After the decision of the above libel for wages, six suits by libellants against the master for the unlawful imprisonment were tried, and an opinion was pronounced by the court in favor of the libellants; and defendant having stated that he should take an appeal therefrom, libellant's counsel said that as to one of the libellants he would ask for a decree of only fifty dollars, because his client was unable further to litigate, and a decree for that amount only was rendered for that libellant, and an appeal in that case refused. As to the other libellants, the appeal was allowed.

The causes were subsequently tried in the circuit court, and the decrees of the district court were confirmed with additional costs and interest.

C. G. Thomas, for libellants; *William Dehon*, for respondents.

Recent English Decisions.

House of Lords.

Tuesday, March 13.

Walker *v.* Stewart.

Covenant in conveyance as to use of water — Construction.

A. conveyed to B. in fee a parcel of land, lying about twenty yards from a stream, the soil and both banks of which belonged to A., "with liberty to B. to take water from the said stream for the use of his mill, by a pipe not exceeding twelve inches in diameter."

Held, B. had no right to dam up the bed of the stream so as to force the water into the pipe, thereby making it always run to the full.

This was an appeal from a decision of the Court of Sessions in Scotland. The facts are sufficiently stated in the opinion of the court.

Sir F. Kelly, Q. C., and *Anderson*, Q. C., for the appellants.

The *Solicitor-General* (Bethell) and *Campbell* for the respondent.

The Lord Chancellor.— My lords, this appears to me to be a case as to which the question of what the rights are, admits of not a moment's doubt. Sir Michael Shaw Stewart conveys the land to Walker and others, with liberty to take water from the West Burn, for the use of their work, by a pipe not exceeding twelve inches in diameter, provided they comply with certain conditions. I disregard the conditions, of course; but when I am speaking of the rights, I mean their rights supposing them to comply with all those conditions, "with liberty to take water from the West Burn, for the use of their works, by a pipe not exceeding twelve inches in diameter." Now, the first question which has been raised is, as to whether they may dam up the stream so as to make a pond for some other purpose than that of taking the water. I should have thought, I confess, that that was hardly an arguable point. They are to do nothing but take the

water for the use of their works. But I go a great deal further than that. I think they have no right to dam it up an inch. All they are to do is just what is stated; they may take water from the West Burn for the use of their work by a pipe not exceeding twelve inches in diameter. It seems to have been assumed that they are entitled to have the water in such a state that they shall always have a pipe twelve inches in diameter full of running water, and to take it by a pipe not exceeding twelve inches in diameter. It secures that the maximum they can take is twelve inches in diameter, but there is no provision that that is the minimum; that they shall always have that and nothing less. I agree with the observations of one of the very learned judges, who says that when the privilege is given to them to take water by a twelve-inch pipe, there is given to them incidentally the power to do all that is necessary for that purpose. Yes, all that is necessary for taking care that there is a twelve-inch pipe for conveying whatever water may flow into the twelve-inch pipe, but not all that is necessary for making the water always flow into that twelve-inch pipe. There is nothing pointing to such a provision. It appears to me, therefore, that all that these persons have a right to do is to have a pipe twelve inches in diameter, or a pipe not exceeding twelve inches in diameter, to convey away as much water as can be conveyed by it; that is all the right they have. They have that right, and, in my opinion, nothing more. That is, in my opinion, the only construction to put upon this conveyance.

Lord BROUGHAM concurred.

Exchequer.

Tuesday, June 19, 1855.

BOYLE *v.* WISEMAN.

Evidence — Original documents — Secondary evidence of their contents.

Secondary evidence of a document cannot be given where the original is produced, and when a document is produced at the trial as the original, which is disputed, — it is for the presiding judge to hear evidence upon that fact if necessary, and then himself to decide whether it is the original or not, and to admit it in evidence if it be the original; if not, secondary evidence of the contents of the original.

This was an action for libel, tried at Kingston, before Platt, B. The cause had been once before tried, and the plaintiff on that occasion nonsuited, in consequence of his being unable to prove publication of the libel complained of by the defendant. At the first trial before the chief baron, the learned judge then refused to received secondary evidence of a letter alleged to have been written by the defendant to the Abbé Cognat, in which the authorship of the libel was admitted, and also refused to allow the plaintiff to examine the defendant, in order to try it by that mode of proving his case. On both these points the court directed a new trial, stating that the plaintiff, if he proved that he had used all reasonable efforts to obtain the letter, was entitled to give secondary evidence of its contents, and that the defendant ought to have been sworn. On the second trial as before, the Rev. Mr. Hardinge Ivers was called by the plaintiff to prove that he had seen a letter in Paris written by the defendant to the Abbé Cognat, admitting the authorship of the libel in question, and the plaintiff having shown that all attempts had been made to procure the original letter without effect, proposed then to prove its contents by the recollection of Mr. Ivers, when the counsel for defendant produced a letter, stating it to be the original letter. The witness, however, on inspecting this document said, that in his belief it differed in some essential parts from that which he had seen in Paris, and had copied. Defendant's counsel then tendered evidence to substantiate the identity of the letter so produced with that seen by Mr. Ivers in Paris; but this course being opposed by the plaintiff, the learned judge refused to receive such evidence at that period of the cause, leaving it to the defendant to adduce it subsequently as part of his case to the jury. The case then proceeded, and eventually a verdict was returned for the plaintiff, with 1000*l.* damages, and a rule *nisi* having been obtained to set aside that verdict, on the ground of excessive damages, improper rejection of evidence, and also upon affidavits, and for a new trial.

Lush and *Raymond* showed cause. The evidence tendered at the trial during the progress of the plaintiff's case, had been properly rejected. The plaintiff had complied with the condition which entitled him to go into secondary evidence of the contents of the letter, and the defendant had no right to put upon him a letter and go into evidence of its authenticity, when the witness had denied it. *Jones*

v. *Fort*, M. & Malk. 196, was a case directly in point; *Whitehead* v. *Scott*, 1 Moo. & R. 70, to the same effect.

Shee, Serjt., *Bramwell*, Q. C., and *Willes*, for the defendant, not called upon.

Parke, B. — There will be no occasion to trouble the counsel for the defendant in this case, as we have no doubt at all about the point. If any question of fact arises upon the evidence at *nisi prius*, the presiding judge must decide it, and, if necessary, hear evidence on both sides before giving his determination. If in this case he had decided the letter produced by the defendant's counsel was not the original letter, then secondary evidence of the contents of the letter might have been given, but if he decided it was the original, secondary evidence would then have become unnecessary. The rule is, you never can give secondary evidence of a document when the original is produced, and it is for the judge at the time to determine it; that has been the rule ever since *Major Campbell's case* (*Morley's case*), and is, I think, correct. It appears to me, therefore, in this case, that the learned judge improperly refused to receive the evidence in question, under the circumstances. I think the case of *Jones* v. *Fort* is wrong. No doubt the plaintiff would have been entitled to give secondary evidence of the contents of the letter the witness had seen in Paris, as he had proved that he had taken all proper means to procure the letter without effect; but that was provided the letter itself was not produced in court. If so, no matter by whom produced, the right to give secondary evidence of its contents ceased, for the letter itself ought to be read to the jury. But when it was asserted on the one side and denied on the other that the letter produced was the identical letter seen in Paris, a collateral issue was raised, on which it was the duty of the judge to hear evidence and decide for himself, without reference to the jury, who had nothing whatever to do with the question whether the evidence should be received or not. That was for the judge, and if he came to an erroneous decision it would be subject to the revision of the court, so that no injustice could be done. The rule, therefore, must on that point be absolute, and the others it would be unnecessary now to discuss.

Alderson, B. — I am also of the same opinion. One party said the original letter of the defendant was in Paris; the other party contended it was then in court, ready to be, and was, produced. Who is then to determine that

question? Surely not the jury, but the judge; he is to decide every point that arises as to what is or what is not evidence, and whether admissible; and if he decides erroneously, his decision can be reviewed by the court above and set right. I certainly think *Jones* v. *Fort* is not good law.

Platt, B. regretted that through any mistake on his part the plaintiff had been prevented from going to the jury on the merits of his case, and the case was obliged to go down again. He certainly felt at the trial that he was right in leaving the defendant to call his witnesses in his turn, when, if the plaintiff's witness was wrong, he could be easily proved to be so. That appeared to him to be the way to meet the case, instead of interposing such evidence during the plaintiff's case; but as all the other members of the court were clearly of a different opinion, of course he was mistaken in the view he took.

Martin, B.—In my opinion it is always a question of law for the presiding judge at *nisi prius* to determine what evidence should be received or rejected, and what is the proper evidence; if one party produces a copy of a document, and the other side produces the original, clearly the original is the evidence, — not the copy; and it is for the judge to determine any question arising out of it, and whether it is the original or not, and so receivable. I have seen so many instances of persons attempting to give their belief of written documents from their own memory, and which, upon comparison with the documents afterwards, have turned out to be entirely inconsistent, that I would not put the least trust in any one's statement of the actual contents of a written document. *Jones* v. *Fort* is, I think, clearly a wrong decision. As to the other case, cited by Mr. Raymond from Moo. & R., I believe that to be quite right, but it does not apply to this case, — that was not a question of secondary evidence being admissible at all in the stead of the original. My brother Platt should have decided whether this was the original letter written by the defendant or not, and have heard the evidence with reference to it in the first instance if necessary, when the original was offered, before receiving the secondary evidence of it, and which secondary evidence, if the letter had been by him held to have been the original, would have been rejected. I think the rule should be absolute for a new trial.

Rule absolute for a new trial.

Rolls Court.

May 23 and 30, 1855.

Re THOMSON.

Attorney and client — Original letters and copies of letters written — Right of client to.

Where an attorney has ceased to be employed, he must deliver up to his late client all original letters received by him relating to his late client's business; but he is entitled to retain all copies of letters made of letters written by him on behalf of his late client, and if the client require copies, they must be made by the attorney at the client's expense.

THIS was a petition presented to obtain the delivery to the petitioner, by Benjamin James Thomson, her late attorney, of all original letters addressed to the said B. J. Thomson, as the attorney of the petitioner, relating exclusively to the business of the petitioner, and now in the custody or power of Thomson; and also all copies of letters written by Thomson, as such solicitor, on the business of the petitioner, now in the custody or power of Thomson. The petitioner had discharged Mr. Thomson from being her attorney, and had paid him his bill of costs, but he had refused to deliver up to the petitioner, with the other papers in his possession belonging to her, the original letters received by him, and the copies of letters sent to him, relating to her business, as being contrary to the practice of the profession, but offered to make copies of them at the expense of the petitioner, which she declined. The copies of the letters written by Thomson had been made in a general letter-book, which contained copies of letters relating to the business of other clients.

Waller, for the petitioner.

G. Osborne Morgan, for Mr. Thomson, contended that the original letters received by the attorney were his private property. *Pope* v. *Curlf*, 3 Atk. 341; *Gee* v. *Pritchard*, 2 Swanst. 402. [The Master of the Rolls. — The letters were received by the attorney as the agent of the client.] The letters and copies of letters were retained by the attorney for his protection, as evidence that he had discharged his duty. The copies of letters were made by the attorney for his own convenience. He was not bound to make them, and the client was not charged for the copy; they were mixed up with the copies of letters referring to other

matters. The practice of the profession was not to deliver them up.

Waller, in reply, submitted that the copies made of letters written by the attorney were included, by inference, in the charge made for writing the letters. How could the business of the client be properly conducted by the attorney without copies of the letters written by him?

The MASTER of the ROLLS said he would consider the question; but his present impression was, clearly, that the original letters were the property of the client, and must be delivered up; but he thought that the copies made of the letters written by the attorney were so made for his own security and benefit; that he was not bound to make such copies; and that the copies were not charged to the client; and therefore that the attorney was entitled to retain them.

May 30.— The MASTER of the ROLLS said his opinion remained unchanged as to both points; and he made an order for the delivery of all original letters written by third parties to the attorney relating exclusively to the business of the petitioner; and that any copies of such letters required by Thomson, should be made by him at his own expense; but he refused to order the delivery of the copies made of letters written by Thomson, relating to her business, but gave her liberty to have copies delivered to her at her own expense. He made no order as to costs.

Crown Cases Reserved.

Before POLLOCK, C. B., PARKE, B., COLERIDGE, CROMPTON and CROWDER, JJ.

Saturday, April 28.

REGINA *v.* ARCHER.

False pretences— Credit given to the prisoner instead of his supposed principal.

Upon an indictment for obtaining goods by false pretences, it was proved that the prisoner falsely represented himself to the prosecutors as being connected in business with one J. S., of N., whom he stated to be a person of wealth, and by that representation obtained the goods for himself, and not for the supposed J. S.:

Held, that, although the credit was given to the prisoner himself, he was properly convicted.

THE prisoner was indicted at the last sessions for the borough of Leeds, and convicted of obtaining goods by false pretences.

The false pretences set out in the indictment were substantially these: That there was one John Smith, an ironmonger of Newcastle, who was worth thousands, and who twice a year took out goods to New Orleans, and that the prisoner wanted some cotton goods for the said J. S.

On the trial before the said recorder, evidence was given sufficient to warrant the conviction of the defendant on every one of the four counts, unless the following objection taken by the counsel for the defendant be valid: The said counsel contended that the evidence showed that Samuel Hirst and John Holt, the two persons named in the indictment as owners of the goods obtained by the defendant, contracted to sell the goods to the defendant, not to the supposed John Smith, and delivered, and caused to be delivered to the defendant, in pursuance of such contract, the goods for the defendant himself, and not for the supposed John Smith; and the said counsel contended that this being so, the defendant was entitled to an acquittal, although it should appear that such contract and such delivery in pursuance of such contract, resulted from the falsehoods told by the defendant as charged in the indictment, and from the belief given to such falsehoods by Samuel Hirst and John Holt.

The jury, in answer to questions put to them by the recorder, stated that they were of opinion that the representations were made by the defendant as charged in the indictment, and that Samuel Hirst and John Holt believed such representations, and that such representations were false, to the knowledge of the defendant; and that Samuel Hirst and John Holt, in consequence of such belief, thinking that the defendant was a person with whom they might safely contract, as being connected with the supposed John Smith, and employed by him to obtain the goods, did mean to contract with the defendant, and not with the supposed John Smith, and did in pursuance of such contract deliver, and cause to be delivered, the goods to the defendant, for the defendant himself, and not for the supposed John Smith.

The recorder directed the jury that, upon this view of the facts, they ought to find a verdict of guilty, which they found accordingly.

The defendant was sentenced to be imprisoned and kept to hard labor for nine calendar months; but execution of the judgment was respited, and the defendant not being able to find bail, was committed to prison until the question hereafter mentioned should have been considered. He is still in prison.

The question for the opinion of the justices of either bench and barons of the exchequer is, whether the defendant ought to have been convicted under the circumstances above stated?

Pickering, for the prosecution. The only difference between this and the common case of false pretences is, that here credit was given to the prisoner, and not to the person by whom he represented that he was employed.

Parke, B.— The only doubt is, whether his representation amounted to more than this, that he intended to send the goods to Smith. If he said, "I want to buy this ornament for the Emperor Napoleon," it would not import that he was employed by the Emperor; only that he intended to send it to him.

Pickering.— The false representation is that he was connected with a person of opulence; and the jury have found that he obtained the goods by that false representation.

Pollock, C. B.— We all think that that is enough; and that the conviction must stand.

Parke, B., Wightman, Crompton and Crowder, JJ., concurred.

Conviction affirmed.

Regina *v.* Foster.

Uttering counterfeit coin — Evidence of guilty knowledge — Subsequent uttering of base coin of a different denomination — Improper reception of evidence.

Upon a charge of uttering counterfeit coin, in order to prove guilty knowledge, evidence is admissible of the subsequent uttering by the prisoner of counterfeit coin of a different denomination.

The improper reception of evidence upon a criminal trial is not necessarily a ground for quashing the conviction, if the other evidence adduced be amply sufficient to sustain it.

The following case was reserved by Parke, B.:—

The prisoner was indicted at the last Liverpool assizes

for having (after a previous conviction for uttering counterfeit coin) uttered a counterfeit crown piece at Manchester, on the 12th Dec. 1854, to Jane Ann Needham, knowing it to be counterfeit.

The uttering a counterfeit crown on that day by the prisoner to Jane Ann Needham was proved.

To prove guilty knowledge, the uttering of another crown piece by the prisoner at Manchester on the 11th Dec. 1854, was proved.

The prisoner on that occasion, on its being stated to her to be a bad crown piece by the shopkeeper to whom it was given by her, said she would bring her husband and daughter to show where she got it, and was permitted to depart on her promise to bring them, but she never returned.

In order further to prove guilty knowledge in the prisoner, the prosecutor offered to give evidence of a subsequent uttering by the prisoner of a counterfeit shilling on the 4th January.

The counsel for the prisoner objected that subsequent uttering of a different species of counterfeit coin was not admissible to show guilty knowledge at a prior time.

I had some doubt as to the propriety of receiving the evidence, and intimated that I should reserve the point for the consideration of the judges, if the evidence should be received and the prisoner convicted; and considering the proof in the case, besides that of the subsequent uttering, I thought the evidence would have been withdrawn. But on the part of the crown it was stated that it was very desirable to have the point settled, as the case was of frequent occurrence in practice, and considerable doubt was entertained upon it. I therefore reserved it.

The jury found the prisoner guilty, and voluntarily added that they found the verdict without considering the evidence of the subsequent uttering in the least.

The prisoner was sentenced to four years' penal servitude. I pray the advice of the judges. *Vide* 1 Phillips on Evidence, 510; Taylor, 250; Roscoe, 85.

This case was not argued by counsel.

Parke, B., mentioned that he had reserved the case in consequence of an intimation that the point is one of frequent occurrence, and one which the authorities of the mint desired to have settled; but, after the declaration of the jury that the evidence objected to had not influenced their verdict, the court was not bound to consider the case, there being other evidence amply sufficient to sustain the

conviction. Russ. & R. 132. The rule in that respect is different in criminal and civil cases.

Pollock, C. B.— I, however, think that the evidence was admissible. The value of it is another matter. It seems to be conceded that the subsequent uttering of another crown piece would have been clearly admissible, and it seems to me that the difference in the description of bad money uttered by the prisoner at different times, is a circumstance which can only go to the effect of the evidence,— not to its admissibility. Evidence of some other dishonest act of course would not do; but the uttering of base coin, though coin of a different denomination, is sufficiently connected with the offence charged to render the evidence admissible.

The other judges concurring.

Conviction affirmed.

Miscellany.

THE COURT OF CLAIMS.

The act of congress organizing this new branch of the federal judiciary, forms the most important feature in the legislation of the last congress. It belongs essentially to the class of reforms that affect the permanent interests and welfare of the people. We trust that it is but the forerunner of many other improvements of which we stand in need. As a people, we are reluctant to disturb the established laws of the land, to venture on the dangerous grounds of experiment and progress. We are not adverse to change, but how few changes bring with them a corresponding advance in the prosperity and happiness of the country! The *student* of Lord Coke soon becomes his *disciple*, and, as such, not only comprehends his learning, but imbibes his prejudices. He cannot, however, in this age, remain steadfast by his faith. Everything around him tells him, that notwithstanding he has been taught that law is a science, and a science, too, that claims nothing less than the arrogant distinction of being the perfection of reason, still the lessons of history, the conditions of society, and the march of time, with all its attendant changes in moral, physical, and intellectual science, compel the common law not merely to relax its rigor, but to abandon its rules, and to illuminate its devious and intricate labyrinth of artificial distinctions and absurd technicalities, by the lights of modern experience. Blackstone, at this day, will hardly give elementary instruction in the principles of English law, as now practised in the courts of Great Britain. Not merely in the organization and multiplication of her courts, bringing justice home to the very doors of her subjects, but in the rules of evidence, and more radically in the laws of real property, has England set the world an example of real and substantial reform. Her

greatest lawyers, rising superior to the force of education, and the love of class, have been the first to move in this great work. The States of this Union furnished England many valuable hints, and many good laws. She stands debtor to Pennsylvania, New York and Massachusetts for the new spirit that has been infused into her common law jurisprudence, but ere long she will discharge the obligation by giving back to us a complete and matured system of legal principles, capable of administering both law and equity cheaply, speedily and efficiently. The late Horace Binney Wallace, whose premature death has deprived the world of the best fruits of his well trained and well stored mind, imbued with the philosophy of Comte, and becoming his most brilliant disciple in America, as the great reformer has himself testified, conceived the idea of writing a work on the civil law, on the system of the inductive philosophy; and had he lived to execute this grand thought, he would doubtless have given us a work much better than codes and digests, embodying the truths of history, the fruits of experience, and the principles of law adapted to the present state of society, as deduced from the history of the past. But let us return to our subject.

The act of the 24th February, 1855, establishing the Court of Claims, confers upon it a jurisdiction to "hear and *determine* the claims founded upon any law of congress, or upon any regulation of an executive department, or upon any contract express or implied with the government of the United States, and all claims which may be referred to said court by *either* house of congress."

This grant of powers may be said to comprehend all legal causes of action not arising from tort, as contradistinguished from those that are merely meritorious, which latter may be specially referred to the court by either house of congress. The mass of claims now existing against the government, has been accumulating ever since the revolution, and they are sufficient, both in number and magnitude, to occupy the court for years to come. Many of them rest upon evidence of the highest character. They are supported either by judgments obtained in the courts of the different States, or by documents on the files of congress, or in the executive departments, or by testimony already taken before committees of the house or senate, and duly reported. We apprehend that there are at present but comparatively few cases depending on oral testimony. This state of things will not only lessen the labors of the judges, but it will likewise prepare the way for a better understanding of the merits of the cases, and a more prompt and satisfactory decision on the points involved in dispute. Congress has provided that the court shall have power to call upon any of the departments for any information or papers it may deem necessary, and have the use of all recorded and printed reports made by the committees of each house, when deemed to be necessary. Thus, besides the right to take testimony in cases which present a *primâ facie* case against the government, every facility is afforded to obtain such documentary evidence in the archives of the country, as is required for a proper adjudication of the claims.

The jurisdiction is "to hear and *determine*," but only *sub modo*. Very unwisely, in our opinion, congress has reserved the right of approval and reversal. When the court shall have *finally* acted on a case, they must report to congress the material facts which they find established by the evidence, with their opinion in the case, and the reasons upon which such opinion is founded, together with the testimony. In those cases which shall have received the favorable decision of the court, they are to prepare bills, in order that it may be carried into effect. The bills reported are then fairly launched upon the sea of congressional legislation, to be tossed

to and fro by the winds and waves of policy, self-interest, and perhaps political sentiment. When an adverse report is made, the claim is to be placed upon the calendar, and in the course of time it comes up for the action of congress, to be either confirmed or reversed. The court, while it possesses a high responsibility and a most delicate trust, act, nevertheless, as mere *auditors* to congress. The act of congress creating the court, is entitled "An act to establish a court for the *investigation* of claims against the United States."

We believe it would have been much better had congress made the decision of the court final and conclusive, with some provision by which a just claim could have been paid out of the treasury, without subjecting the claimant to the uncertainty of congressional action, after he has undergone the trouble, inconvenience, risk and expense of litigation. The power given to the court is *judicial*, and why not leave it so, and make it complete and efficient, instead of confounding its functions with those of congress, which are purely *legislative?* To doubt much about the right of congress thus to enlarge the powers of the court, is almost to doubt the constitutionality of the court itself. But in spite of these objections, the Court of Claims is destined to do a great deal of good, — and although much depends on congress, still much also depends upon the judges. The appointments to the bench deserve our unqualified praise. The judges are well calculated to inspire the confidence of the country. Their talents are undoubted, — and to great learning, they combine exalted integrity, dignified manners, and close application. Such high character, in such a tribunal, was absolutely required. Had the President of the United States, instead of looking for the objects of his choice among those who occupied the highest judicial seats in the several States, or filled distinguished situations in the universities of the country, turned his attention to the throng of mere politicians or partisans, — not only would he have abated the dignity and importance of the court, but, we doubt not, he would likewise have limited the duration of its existence. After a full and patient hearing and argument before a court thus constituted, and its calm, deliberate and impartial decision, no man either in or out of congress, should hesitate about placing implicit reliance on the correctness of the conclusion to which the court shall arrive. It will cease almost to be a court, unless such proves to be the result, while every consideration, public and private, points out the danger of suffering the subsequent action of congress to give the character of risk or uncertainty to the reports which the judges are required at regular periods to make. The learning, integrity and impartiality of the court, joined to the good sense and a spirit of fair dealing in congress, must be our remedy against an evil which may possibly, although not probably, be proved to exist.

The proceeding to establish a claim, is by petition, setting forth a full statement of the claim, and of any action thereon in congress, or by any of the departments, and specifying also what persons are owners of the claim or interested therein, and when and upon what consideration they besome so interested. The petition must present a *primâ facie* case before permission can be obtained to proceed further; for if the court shall be of opinion, on the reading of the petition, that the facts set forth therein furnish no ground for relief, then it is provided, that it shall not be their duty to authorize the taking of any testimony in the case, until the same shall have been reported to congress; but should congress fail to confirm the opinion of the court, then the claimant may proceed to take his testimony. By the third section of the act, the court has authority to establish rules and regulations for its government; to appoint commissioners, and issue commissions and subpœnas. The interests of the government

are entrusted to a solicitor, who discharges for the United States all the duties of counsel which each case requires. Mr. Montgomery P. Blair, the gentleman who now fills that office, is known to possess fine professional attainments, and he will, doubtless, sedulously apply himself to the discharge of his important trust.

The practice of the court has been regulated by a set of rules, published by the judges, which go far to supply many of the deficiencies of the law itself. The petition must be printed and sworn to, and must present the claimant's case specifically. If the claim is founded upon any implied contract, the circumstances upon which the claimant relies as tending to prove a contract, must be detailed. By rule 5, if the solicitor shall be of opinion that the petition does not furnish a proper case for the action of the court, he is to file his objections to the same. And, to simplify the proceedings, it is provided that there shall be no other pleadings in the case. Since these rules were published, the court have been called upon to construe them in one or two particulars. In the first place they have held, that although the petition is required to be printed, yet in cases where the claimant is unable to set forth his case with the particularity required by the rules of court, from the want of an inspection of documents on file in the departments, the court will entertain a written petition, and, if needs be, make an order for the production of the required papers. In the next place, the court have said that the solicitor is not allowed to file a general demurrer to a petition, but, if he objects to the sufficiency of the same, he must point out specifically the grounds of his objections. The court have also held that their authority under the act of congress to call upon the executive departments for papers, does not extend to the clerk of either house of congress, and in these particulars, as well as in many other matters of detail, it has already been made manifest the statute has been but imperfectly framed. So far as the court were able, they have supplied the machinery necessary to the proper working of the law, but it needs more. We can foresee many difficulties in the way of its harmonious execution. For instance, the act of congress gives the court power to appoint commissioners, and to issue commissions for the taking of testimony, and also subpœnas to require the attendance of witnesses before commissioners, compliance therewith to be compelled under such rules as the court shall establish. No power is given to the commissioners to issue subpœnas or to enforce the attendance of witnesses. A refractory witness, whose testimony is to be taken, it may be, we will suppose, a thousand miles from the seat of the court, may set the court, commissioners and parties at defiance, for a time at least, and so clog the wheels of justice. If he shall fail or refuse to appear and testify before any commissioner, after having been duly summoned, and his fees tendered him, instead of being proceeded against summarily by *attachment*, under the hand and seal of the commissioner, the *court* must be moved for a rule upon him to show cause why a *fine* should not be imposed upon him, and if he fail to show sufficient cause, he is to be fined not exceeding *one hundred dollars*, and there the matter, we presume, ends. A little experience, however, will suggest the legislation necessary for the exigencies of the law, and in a short time we hope all will work well.

Some apprehension has been expressed about the expenses of prosecuting cases before the Court of Claims. But our opinion agrees with that of a contemporary, who says there is no court of so high a grade where the expenses are less, nor one where the facilities for speedily ending a case are greater. The practice prescribed by the statute and the rules of the court, are of the most simple and convenient character. If the claimant fail of success, he is not subjected to be mulcted in the

amount of his adversary's costs, nor compelled to pay the court, or the clerk, heavy bills of fees. The only expense to which the petitioner can be subjected is that of his counsel, the fees of commissioners for taking his testimony, his witnesses' fees, and the charges for printing his papers, which charges are not greater than in other courts in which clerks and other officers are authorized to demand in addition large amounts for fees. The great charge in all courts is the fees of the counsel, which are usually matters of agreement with the client. In the Court of Claims there is no good reason why they should be higher than in other courts, nor ought they to be as high as it is understood agents before congress have usually charged. The practice of the court is so arranged that claimants may employ counsel in their own vicinity to present their case, take the testimony, and prepare it for argument. They may then either send a printed argument, or employ such counsel to argue it orally as they choose.

Such, in brief, is this new court. It has an auspicious beginning, and we cannot but sincerely trust that the faith and confidence now reposed in it, may continue to abide with it, and that its judgments may be so just and enlightened as to establish it *permanently*, as well in the affections of the people, as in the judicial system of the federal government.

If M. De Tocqueville was filled with wonder and admiration on entering the Supreme Court of the United States, to hear the chief justice call two sovereign states before him as litigating parties in a pending suit, it would be equally edifying to him to see the humblest citizen in the land summon before the Court of Claims the majesty and power of the federal government to answer for some contract broken, or some wrong unredressed. Not in the abject form of a suppliant stooping at the footstool of power to crave mercy, but in the simple dignity of American citizenship, standing erect and unabashed, demanding justice from the appointed ministers of the law. Such, happily, is an illustration of a government that reposes its stability on the will and affections of a free people.[1]

Superior Court — Commonwealth of Massachusetts. — [*Official.*] — Question proposed to the Supreme Judicial Court by the Governor and Council, June 27th, 1855.

Can the judges of the superior court for Suffolk county be appointed before the first Tuesday in October next?

The act establishing said court taking effect "on and after" the first Tuesday in October, and the terms of the court of common pleas being abolished "from and after the time when" said act takes effect, and the first term of the new court being on the first Tuesday in November, is there any irregularity or hiatus in the transfer of the common pleas business, or anything affecting the municipal court business for October?

The undersigned, justices of the supreme judicial court, having received and taken into consideration the question proposed to them by his excellency the governor, with the advice of council, dated 27th June, A. D. 1855, a copy of which is annexed, have the honor, in answer thereto, to submit the following opinion.

Can the judges of the superior court for Suffolk county be appointed before the first Tuesday in October next?

In answer to this question, we are of opinion that the judges of the superior court for the county of Suffolk cannot be appointed before the first Tuesday, which will be the second day of October next.

The act to establish the superior court of the county of Suffolk, being

1 We find that the rules of this court, as printed in the Law Reporter for August last, do not correspond with the authorized edition now issued by the court. We shall indicate the differences in our next.

the statute of 1855, chap. 449, was passed on 21st May last, and the last section provides that the act shall take effect on and after the first Tuesday of October next. It is a general rule, that all statutes take effect and go into operation at and from the time of their passage, unless a different time be prescribed by the statute itself, or by some general law, in force at the time of its enactment, fixing the time at which it shall go into operation. By the Revised Statutes, chap. 2, sec. 5, every statute which does not prescribe the time shall take effect on the thirtieth day next after it is passed. But when any statute does itself prescribe the time when it shall take effect and go into operation, such provision, when it is general, and without exception of any part of the act, applies to and qualifies every part and portion of the statute. Every provision and clause of the act, whether it be for making any new law, or for repealing, qualifying, or amending any old one, is absolutely suspended until the arrival of the time limited for its going into operation, to the same effect and purpose as if it had been passed on that day. If such an act confers powers on the governor and council to appoint officers, or on the legislature or people to elect them, such powers do not become vested in such magistrates or people until the day limited for the act to go into operation. If it repeals any pre-existing law, such law remains in force until the time for the repealing act to take effect. And the same is true of every other provision repealing, changing, or modifying an existing law; it remains unrepealed and unaffected until the time fixed for the new law to go into operation. And we are of opinion, that whichever of these phrases is used where a future day is fixed, applicable to the whole act, — viz. "that it shall go into operation on and after such a day," or, "that it shall take effect," or, "that it shall be in force," — they mean the same thing, and suspend the entire operation of the act till the day named. Both terms, "shall go into operation," and "shall take effect," are used in the Revised Statutes, and are apparently used indiscriminately.

Nor does it, in our opinion, make any difference that no negative words are used; as, for instance, on such a day, "and not before." This is well illustrated in both particulars by the case of *Commonwealth* v. *Fowler*, 10 Mass. R. 290. By statute 1811, chap. 137, passed February 25, 1812, the county of Hampden was established. By the last section it was enacted, that "this act shall take effect and be in force from and after the first day of August next." The provision was general, and there were no negative words. A judge of probate, sheriff and other officers having been appointed before the day fixed for the statute to take effect, it was held that such appointments were made without the authority of law, and were void.

These are some of the principal reasons upon which we have come to the opinion, that this act confers no authority upon the governor and council to appoint or nominate judges for the superior court for the county of Suffolk before the first Tuesday of October next, and that such appointments would be void.

The act establishing said court taking effect "on and after" the first Tuesday in October, and the terms of the court of common pleas being abolished "from and after the time when" said act takes effect, and the first term of the new court being on the first Tuesday in November, is there any irregularity or hiatus in the transfer of the common pleas business, or anything affecting the municipal court business for October?

The seventh and last question involves more complicated considerations of detail, and requires a somewhat extended answer. The first question is, whether, by force of this act, the term of the court of common pleas, to be holden on the first Tuesday of October next, is abolished or not. It is very clear that the law providing for a term of that court on that day is

now in force, and will remain in force, until that same first Tuesday of October shall have arrived, and it is not abolished till that day, but is abolished from and after that day. Now, we think it is a sound rule of construction, that when several things are to be done or take effect on one day, but no particular part of the day is mentioned, as there is no fraction of a day, but they are treated in law as simultaneous, they shall be so construed that the acts shall be done, or the things take effect, in that mode and in that order which will best reconcile all the provisions of the statute, and best carry into effect the whole intent and purpose of the entire statute. Now, it is the manifest intent of the statute, that the terms of the superior court are to succeed and be substituted for the terms of the court of common pleas, and that when these are abolished the other shall *es instante* take effect. And we think it will better harmonize all the provisions of the statute, and comport with the policy of the act, to hold that the act shall be so construed as to leave the old law *in force*, so far as it establishes a term of the court of common pleas on that day; and that the clause abolishing the terms of the court of common pleas in Suffolk, and substituting terms of the superior court, shall be so construed as to take effect and be in force after and subordinate to the clause which establishes that term of the court of common pleas. On this construction, both clauses will have their proper force and effect. Assuming, then, that the October term of the court of common pleas is not abolished by the act in question, we are of opinion that all writs and processes legally returnable to that court, at that time, will be properly returnable, and may be rightfully entered, by the clerks of that court on said day; and that any judge of the court of common pleas, and who might have held that term of the court, may open and hold the same. Then, by force of the thirteenth section of the statute, every action, suit, process or proceeding which shall then have been entered in the court of common pleas for the county of Suffolk, shall forthwith be transferred to, and have day and be heard in the said superior court, &c. We are therefore of opinion, that in regard to all matters pending in the court of common pleas on the first Tuesday of October, including all writs and processes, rightly made and served, returnable to the court of common pleas, by law to be holden on that day, there will be no irregularity or hiatus in the transfer of the common pleas business to the superior court, which will be established on the same day; although there may be then, and for some days after, no judge actually appointed and qualified to exercise the jurisdiction thus conferred on and vested in such court. It will be the ordinary case of a court established, with fixed powers, although the offices of the judges of such court are then vacant.

The next question arises respecting writs and processes made and served during the fourteen days next before the first Tuesday of October. During all that period a law is in force which establishes a term of the court of common pleas to be held on the first Tuesday of January; and, by the same law, all such writs and processes, made and served during said fourteen days, are returnable to the term so to be held on the first Tuesday of January. Such writs and processes will be legally issued and served, being in conformity with the law in force at the time. But then comes in the latter clause of the same thirteenth section of the act we are considering, which directs that every writ, suit, or process which shall have been commenced, but not entered, shall be entered and have day in the said superior court on the return day of the writ or process, whether the same be at the commencement of a term of said superior court or not. In fact, it so happens that these writs and processes would be made returnable to the common pleas on the first Tuesday of January, and this act provides for a term of the superior court on that same day, so that such

writs and processes will be entered on the same day, in the superior court, on which they would have been entered in the court of common pleas, if this act had not taken effect in the meantime; and in regard to these, there will be no irregularity in transferring the business commenced in the court of common pleas to the superior court.

But another question arises, in regard to actions and suits to be brought after the first Tuesday of October, and before the time at which the superior court may be organized, by the appointment of judges and clerks. By the statute, judges are to be appointed in the manner provided by the constitution, and a clerk and assistant clerk are to be appointed by the court, until otherwise provided. The difficulty is this, arising from the provisions of the act itself. This act provides, section 2, that the said superior court shall establish a seal for the said court, and that all writs and processes issuing from the same court, which by law are required to be under seal, shall be under the seal and signed by the clerk or assistant clerk thereof, and may run into any county, and shall be obeyed and respected throughout the commonwealth. It appears to us, therefore, that before any writ can issue from the said superior court, by which any action or suit can be commenced therein, there must be a seal established, and a clerk or assistant clerk appointed; and before such seal can be established, or such clerk or assistant clerk be appointed, judges must be appointed, commissioned and qualified. Besides, every writ and process issued by any court shall, by the constitution, chap. 6, art. 5, bear test of the first justice of said court; and, until the appointment of judges of said court, this requisition of the constitution cannot be complied with. We are, therefore, of opinion that, during the time which must necessarily elapse from the first Tuesday of October, when this act goes into effect, until judges of said superior court can be constitutionally appointed, commissioned and qualified, there must be an irregularity and interruption in transferring the business, which would have otherwise belonged to the court of common pleas, to the said superior court, and that during that time no suit or process of which the common pleas has heretofore had exclusive jurisdiction, or of which said superior court has exclusive jurisdiction, can be brought either in the court of common pleas, because its jurisdiction is transferred, nor in said superior court, for the reasons above stated.

The last clause of this question is, whether anything contained in the act in question will affect the municipal court business for October. To which we answer, that in our opinion it will affect that business to some extent, but not essentially.

By this act the terms and course of proceeding in the municipal court are in no respect changed. The provision is, that the justices of said superior court shall be *ex officio* justices of the municipal court for the city of Boston, and shall have all the powers, in relation thereto, which the justices of the court of common pleas now have, and shall perform all the duties heretofore required of them. The only effect of the statute is to substitute the justices of the superior court in place of those of the court of common pleas, as judges in the municipal court, from and after the time when the act takes effect. We are, therefore, of opinion, that the term of the municipal court, which will commence on the first Monday, being, the present year, the first day of October, will be rightfully held by a judge of the court of common pleas, being a day before this act will take effect. Such judge will rightly open the court, empanel the grand jury, and perform the duties usually performed on the first day of the term. But after that time the functions of such judge will cease, the business must be suspended, including the duties of the grand jury, and the court must be

adjourned, in the manner provided by law, when no judge is present to hold the court, until one or more judges of the superior court shall have been appointed, commissioned and qualified; and when any judge is thus appointed and qualified, he will have full authority to hold the said municipal court, and then take up and proceed with the business pending in said court, in the same manner as if no such interruption and no such adjournment had occurred. To this extent and this only, in our opinion, will the business of the October term of the municipal court be affected by the passage and operation of the act to establish the superior court of the county of Suffolk.

LEMUEL SHAW,
CHARLES A. DEWEY,
THERON METCALF,
GEORGE T. BIGELOW,
BENJ. F. THOMAS,
PLINY MERRICK.

Boston, 2d July, 1855.

A Hard Case — English Laborers. — We wish to recall the attention of our readers to a letter which appeared in our paper of Friday, and referred to the hard case of two poor men, Thomas and George Collin, condemned to imprisonment and hard labor in the county jail of Chelmsford, for leaving their work of haymaking one afternoon in the early part of the month in order to witness the inspection of the Essex corps of yeomanry artillery and cavalry. It appears that the brothers, laborers in the employ of a Mr. Joseph Brown, a small farmer of Roydon hamlet, gave notice to their employer's foreman, on the evening of Saturday, the 4th inst., that they should want a half-holiday on the ensuing Monday to witness the review. To this proposition the foreman neither assented nor refused. The brothers, together with their father, went to work on the Monday morning at half-past four o'clock, being an hour and a half before the usual time, as they were anxious to get their work forward. At one o'clock, a large concourse of people having collected at Nazing-mead, the spot selected for the review, and the foreman having told them to leave off mowing, Thomas Collin proceeded at once to the review ground, and George followed at two o'clock. Two days passed, during which the brothers went to their work as usual; but on the Thursday morning they were sent for by their employer, and, on obeying the order, found a policeman in attendance. They were taken into custody under a warrant from the Rev. George Hemming, of Little Parndon, by which they were committed to Chelmsford jail for fourteen days, with hard labor.

This is the brief history of what may be justly styled a very hard case. Mr. Palmer, of Nazing Park, out of commiseration for the hard treatment of the men, appealed to Sir G. Grey, and received an answer that the home secretary could see no sufficient ground for advising an interference with the prisoners' sentence. This gentleman then appeals to the public through our columns, in the hope that the indignation and pity of the world, if even it comes too late to save the sufferers from the term of imprisonment awarded them, may yet preserve the country from such scandalous convictions in future; for the narrative we have just given must be received with surprise by all who do not know the details of agrarian law, and the somewhat oriental jurisdiction which statute or custom has given to magisterial squires and rectors over the humble and unresisting tillers of our soil. It is something to be reminded that men, stated to be respectable, may, for temporarily absenting themselves from work, be punished, not by loss of wages, not by discharge from employ-

ment, but by imprisonment in a felon's cell, and a condemnation to a felon's labor. That the decision which consigned these brothers to Chelmsford jail is authorized by the law of the land and the custom of the locality where the Rev. G. Hemmings administers justice, we do not doubt; but the question arises, is such a law tolerable, when it can be put in force on such an occasion and in such a spirit? — *London Evening Mail.*

Marriage with a Deceased Wife's Sister. — For some three weeks past, a case of great importance has been pending in Scotland before Lord Ardmillan, in the shape of a petition of service between Alexander, nephew, and claiming to be heir male of the late Admiral Sir Thomas Livingstone, and Mrs. Fenton, claiming to be the heir, whatsover, upon the failure of heirs male. On the part of Alexander, the stake is the entailed estate of Bedlormie and others, with the baronetcy thereof, and also the dormant peerages of Callander and Linlithgow. The objection raised by Mrs. Fenton to the claims of Alexander, the heir male, is, that his mother was the sister of his father's first wife. This Alexander meets, first, by the plea that his domicil being in England, the question must be ruled by the law of England, and that his parents having been married by the law of England, he must prevail; secondly, that although at one time the marriage might have been avoidable by the English law, under Lord Lyndhurst's act, it could not now be inquired into there, and that the same rule must apply in Scotland; thirdly, that the relationship of his father's two wives is not proved; fourthly, (and this brings out the question which gives the matter public interest in Scotland,) that *esto* the two wives were full sisters, there is nothing in the law of Scotland to illegitimatize him in respect thereof. The case has been depending for several weeks, and the arguments of junior counsel for the claimant, Alexander, are nearly concluded. — *Law Times.*

A Judge fined for Drunkenness. — At the Birkenhead police court, Mr. Robert Grace, the steward and judge of the Wapentake court for the hundred of Wirrall, was summoned last week for being drunk and disorderly, but he did not appear. Mr. Richard Jones, the assistant overseer of Birkenhead, who made the complaint, said he simply asked that means might be taken to prevent Mr. Grace from coming to his premises whilst drunk and annoying him. The judge was fined five shillings. — *Illustrated London News, Sept.* 8, 1855.

Notices of New Books.

A General Digest of the Principal Matters contained in the Exchequer Reports, from 1824 to 1854, inclusive. Edited by Asa I. Fish. Philadelphia: T. & J. W. Johnson, Law Booksellers. 1855.

"This Digest," says the preface, "embraces the decisions of the court of exchequer and exchequer chamber, from the reports of McCleland and Younge, in 1824, to the ninth volume of Welsby, Hurlstone and Gordon, in 1854, inclusive. In its plan and arrangement it does not differ materially from Wise's Index to Meeson & Welsby, which has met general approval, and which is incorporated in its pages."

It contains, then, a large body of valuable law, and is creditably published. The merits of such a work, like those of a friend, must be tested by long trial; and a reviewer's inspection ought not to be made the basis of a too confident criticism, for if it detect faults, it may also pass by merits. We find in this volume an abundance of heads and references, which we esteem an advantage, although it may sometimes degenerate into a fault. It is well, too, in a large digest to multiply subdivisions. Anything which breaks up a very long title, and facilitates the discovery of a single point or case, is of great advantage.

We find subdivisions under a general head, and the same subdivisions erected into separate titles, or two titles for subjects which might have been embraced, and would naturally be sought for, under one, not always with cross references. These things would not occasion much inconvenience if cross references were made, although the first we should even then consider a fault; for all matter properly coming under one head should be put together. There is the head of "Bankrupt and Bankruptcy," and also "Commissioner of Bankrupts." Under the first is the subdivision, "Powers of Commissioners," but we find no cross references.

We find "Agreement," "Contract," and "Undertaking," all of which, in our judgment, should be together, also "Commitment" and "Committal," — the single point given under the last, however, seems to have crept in by mistake, for we can perceive no relation to the subject.

There is the head of "Construction," containing points relating to statutes and deeds; but under "Deeds" we find the subdivision of "Construction," with no reference to the first head. Under "Statutes," also, we find cases upon "Construction," besides a head, which we esteem a very useful one, of "Words," giving the construction put upon different words and phrases. Again, there is "Damages," with cases upon "Liquidated Damages," and the latter repeated as a separate head. We have "Notice of Action" by itself, and under "Action;" "Right to Begin" by itself, and under "Practice;" "Agent" and "Principal and Agent;" "Bail," and "Holding to Bail." We should not ourselves have made such heads as "Admissibility of Evidence," or "Holding to Bail;" but this may be a matter of taste. There is a head of "Order of Goods." Although twice printed on the page, it must be a misprint for "Owner," for it has nothing to do with "Order."

We find "Nil Debit" three times on one page, a fault which could not have been committed by the editor, but which deserves animadversion in some quarter.

Under "Admiralty" we find a case upon collision, but there is no reference to it from the head of "Collision."

In two cases we notice a repetition of the same point, *in extenso*, under different heads. This may do for those who like to pay for a bulky volume, but when, as in these cases, we find under "Auter Action" and "Abatement," "Admissibility of Evidence" and "Evidence," the same things repeated, even that patient and paying class would be dissatisfied. We are painfully aware of the many difficulties attendant upon such works, and how often the tired editor may find that a fault which his own eye, although too late, recognizes as readily, and his own judgment condemns as heartily, as any other, has in some unaccountable manner crept into his volume. A perfect digest is impossible. We point out here some defects which have caught our eyes, that they may be helped hereafter.

The editor has increased the value of the book by adding references to other reports.

LEADING CASES IN THE COMMERCIAL LAW OF ENGLAND AND SCOTLAND, Selected and Arranged in Systematic Order, with Notes. By GEORGE ROSS, Esq., Advocate, author of "Leading Cases in the Law of Scotland." Vol. I.—"Bills of Exchange and Promissory Notes." Philadelphia: T. & J. W. Johnson, Law Booksellers, No. 197 Chestnut street. 1854.

The plan of this work may be best shown by extracts from the author's preface:

"The design of the present work is to illustrate the commercial law of England and Scotland, by systematizing the leading judgments of the courts of the two countries. . . . .

"Mere abstract propositions of law do not satisfy the student. He wishes to see the principles contained in these propositions applied to actual cases; but the multitude of cases to which he is referred in support of any single proposition forms a serious obstacle to the student's progress. . . . . By separating, therefore, the principal leading cases in the law from the accumulated mass of decisions, it is hoped that the labors both of the student and the practitioner may be lessened.

"The work, however, is not intended as one of reference merely. Its characteristic feature is that of 'teaching by examples.' A continuous perusal of it, therefore, it is hoped, may prove profitable to all who are desirous of being deeply conversant with the principles of commercial law. . . . .

"The points of difference in the law of England and the law of Scotland in regard to bills of exchange and promissory notes are so few, that it was thought unnecessary to separate the cases decided by the courts of the two countries. It is different, however, with the contract of sale. The primary principles of the two systems of jurisprudence relative to that contract being essentially different, although the results in each very nearly coincide, a different course will be adopted."

The first volume is restricted to cases on bills of exchange and promissory notes, and the cases are selected with care and judgment, and we recognize many old acquaintances in the earlier cases on this important branch of commercial law.

The second volume treats of the contract of sale; the first half of it being a selection of English cases, and the second of decisions in the courts of Scotland.

To one unaccustomed therein, the forms and terms of Scottish practice, as set forth in this volume, present a curious and interesting object of examination, though they can be of little practical use to a common law practitioner. The cases themselves, however, are valuable from the principles stated and decided, and are calculated to give a very high idea of Scottish jurisprudence.

We consider the volume before us a valuable addition to the publications on commercial law, and is well entitled to take a place beside their forerunner in name and place, "Smith's Leading Cases."

PRINCIPLES OF THE LAW OF PERSONAL PROPERTY, intended for the Use of Students in Conveyancing. By JOSHUA WILLIAMS, Esq., of Lincoln's Inn, Barrister at Law. Second American, from the Second English Edition. With Notes and References to the latest American Decisions. By BENJAMIN GERHARD and SAMUEL WETHERILL. Philadelphia: T. & J. W. Johnson, Law Booksellers and Publishers, No. 197 Chestnut street. 1855.

This work has reached a second American edition, and we think it will be valuable to the profession. The American law has been noticed down

to the time of publication, and more than 3500 American cases have been cited in the work. There are complete tables of the English and American cases, and an index of subjects.

The attention of the student is particularly called by the author to the subject of the alienation of personal property, which, he remarks, is a subject heretofore too much neglected, in comparison with the same topic in relation to real property. The reason appears to us to be very obvious, the common law having grown up while real property was almost the only property of the kingdom, and personal property was of little account.

Many specific branches of the law of personal property, such as the levying of mortgages, bills of exchange, insurance, &c., are only modern additions to the body of the common law, and we think that a well digested treatise on the subject of personal property, and embracing the topics of conveyancing and alienation, is among the useful additions that can be made to a professional library.

It may be some comfort to us in Massachusetts, under the infliction of our recent legislation, to know that even the British parliament sometimes makes bad work.

On p. 115 of this volume, in a note, will be found the following comment upon the statute 9 & 10 Victoria, ch. 93, § 2, 5.

"This act is a specimen of the common absurdity of modern acts of parliament, in introducing an interpretation clause in one section just to vary the meaning of another. It enacts, in one section, that the action shall be for the benefit of the wife, husband, parent and child; and, in another section, that the word 'parent' shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word 'child' shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter. Now the words 'parent' and 'child' occur only in the one place just mentioned, besides this interpretation clause. Why not, therefore, say at once what is really intended?"

We think we may fairly offset this against any of the blunders of the Massachusetts' Legislature of 1855.

MATHEMATICAL DICTIONARY AND CYCLOPEDIA OF MATHEMATICAL SCIENCE, comprising Definitions of all the Terms employed in Mathematics, an Analysis of each Branch, and of the Whole, as forming a single Science. By CHARLES DAVIES, LL. D., author of a "Complete Course of Mathematics," and WILLIAM G. PECK, A. M., Assistant Professor of Mathematics, United States Military Academy. New York: A. S. Barnes & Co., No. 51 John street. 1855.

The preface of this volume tells us that —

"1. It is a leading object of this work to define, with precision and accuracy, every term which is used in mathematical science; and to afford, as far as possible, a definite, perspicuous and uniform language.

"2. A second object is, to present in a popular and condensed form a separate and yet connected view of all the branches of mathematical science. Hence, the work has been called — 'A Dictionary and Cyclopedia of Mathematical Science.'

"3. The work has also been prepared to meet the wants of the general reader, who will find in it all that he needs on the subject of mathematics. He can learn from it the signification and use of every technical term, and can trace such term, in all its connections, through the entire science. He will find each subject as fully treated as the limits of the work will permit, and the relations of all the parts to each other carefully pointed out.

"4. The practical man will find it a useful compendium and hand-

book of reference. All the formulas and practical rules have been collected and arranged under their appropriate heads.

"5. The chief design of the work, however, is to aid the teacher and student of mathematical science, by furnishing full and accurate definitions of all the terms, a popular treatise on each branch, and a general view of the whole subject."

The names of the authors, especially of Mr. Davies, furnish better assurance of its excellence than any opinion we can give. Among the many branches of science which the lawyer is forced to investigate *pro re nata*, mathematics not the least frequently forces itself upon him, and a compendium like this cannot fail to be useful. It would facilitate the use of the volume to find, on the top of the page, some indication of the alphabetical advance of the terms defined; a change which we recommend in another edition.

PRECEDENTS OF INDICTMENTS AND SPECIAL PLEAS. By CHARLES R. TRAIN and F. F. HEARD, Esquires, Counsellors at Law. 1 vol. 8vo. pp. 502. Boston: Little, Brown & Co. 1855.

We have examined this volume with care, and have no hesitation in pronouncing it, so far as it goes, a useful, necessary, and excellent book; and the profession will find it to supply a need which they have long felt. The only reason we annex any qualification to our statement is, that it is hardly full enough. What it contains is so good, that we wish the precedents were more numerous; and we hope the authors will bear this suggestion in mind while they are preparing the succeeding editions. There are books of precedents, English and American, but those that are of authority are not immediately applicable to our wants, and those which profess to be adapted to our statutes and law are not entirely trustworthy. The precedents in this volume are of indictments at common law and upon our statutes, and also upon English statutes. They are, as a whole, neat, exact and complete. There is no verbiage, at least nothing which the decisions yet permit us to call verbiage. They are the work, not of mere theorists and students, but of practised hands; and many of them have gone through the ordeal of well-argued motions to quash and motions in arrest. They are arranged, in regard to their subjects, in alphabetical order, as being more ready for reference; and most of them are preceded and accompanied with directions and notes, in which will be found references to the most recent decisions. The collection of pleas at the end of the volume will be found convenient to the practitioner. We think this work will become "direct authority" with the profession, and we hope its publication will mark the beginning of greater uniformity in criminal pleading and in judicial decisions upon the form and sufficiency of indictments.

The book is dedicated to Edward Mellen, chief justice of the Massachusetts court of common pleas; and its authority with lawyers will be increased by the knowledge that it has been examined and approved by him. Chief Justice Mellen is known to the profession and the public for the extent and exactness of his legal learning, his ready command of authorities, and his conscientious and untiring devotion to official duty. He has made the study of the law the business of his life, and professional eminence the first object of his ambition; and in the universal respect and confidence which his character and public services have secured to him, he is enjoying the appropriate reward of his ability as a lawyer, his diligence as a student, his patience, courtesy and uprightness as a magistrate, and his worth as a man.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Adams, James	Taunton	May 7, 1855,	E. H. Bennett.
Alley, Wm. W.	Boston,	Sept. 4,	Isaac Ames.
Avery Clark	Melrose,	" 5,	John W. Bacon.
Ballard, Allen *	Plymouth,	" 28,	John J. Russell.
Ballard, Samuel D. *	Boston,	" 28,	John J. Russell.
Beckwith, Nelson B.	Mansfield,	Dec. 16, 1854.	E. H. Bennett.
Belcher, Charles W.	Mansfield,	Sept. 13, 1855,	E. H. Bennett.
Berry, Freeman	Pawtucket,	Jan. 3,	E. H. Bennett.
Bourne, Josiah	South Hanson,	Sept. 15,	John J. Russell.
Broadhead, Edward C. †	Brookline,	" 11,	John M. Williams.
Buffington, Edmund	Somerset,	June 18,	E. H. Bennett.
Chandler, Joseph	Boston,	Sept. 6,	Isaac Ames.
Chubbuck, George W. ‡	Weymouth,	" 26,	William L. Walker.
Cole, Lemuel, jr.	Mansfield,	May 29,	E. H. Bennett.
Cutter, John A. B. †	Boston,	Sept. 11,	John M. Williams.
Dispean, Samuel	Grafton,	" 4,	Alexander H. Bullock.
Dyer, Joshua §	Boston,	" 15,	Isaac Ames.
Eddy, Charles	Adams,	" 29,	Shepherd Thayer.
Fowler, Edwin §	Boston,	" 15,	Isaac Ames.
Gardner, Wm. F.	Mansfield,	Dec. 20, 1854,	E. H. Bennett.
Gilbert, Sarah R.	Gloucester,	Sept. 1, 1855,	John G. King.
Goff, Charles, 2d	Rehoboth,	Aug. 13,	E. H. Bennett.
Hale, Henry	Salem,	Sept. 6,	John G. King.
Harden, Charles W. ‖	Mansfield,	Jan. 24,	E. H. Bennett.
Hardy, Charles S.	Westborough,	Sept. 17,	Alexander H. Bullock.
Harris, Timothy N.	Stoneham,	" 12,	John W. Bacon.
Hood, Elisha S.	Somerset,	April 19,	E. H. Bennett.
Hood, George B.	Somerset,	March 8,	E. H. Bennett.
Hood, James M.	Somerset,	" 24,	E. H. Bennett.
Horton, Horace D.	Rehoboth,	Jan. 29,	E. H Bennett.
Hunt, Adam & Hiram ¶	Milford,	Sept. 24,	T. G. Kent.
Kilbourn, Isaac	Charlestown,	" 10,	Isaac S. Morse.
Littlefield, Cyrus I.	Natick,	" 13,	John W. Bacon.
Lovejoy, Charles J.	Boston,	" 19,	J. M. Williams.
Martin, Josiah ‡	Weymouth,	" 26,	Wm. L. Walker.
M'Farland, Warren **	Worcester,	" 5,	Alexander H. Bullock.
Merriam, Charles	Boston,	" 25,	J. M. Williams.
Miller, Levi B.	Worcester,	" 26,	T. G. Kent.
Morrison, Abraham B.	Lowell,	" 11,	Isaac S. Morse.
Morton, Edwin	Taunton,	" 21,	E. H Bennett.
Nelson, Horatio G. ††	Boston,	" 15,	Charles Endicott.
O'Niel, John	Roxbury,	July 2,	Francis Hilliard.
Page, Edward	Worcester,	Sept. 11,	T. G. Kent.
Prescott, Daniel	Boston.	" 27,	Isaac Ames.
Rand, Obed	Woburn,	" 18,	John W. Bacon.
Robinson, Daniel T.	Boston.	" 15,	Isaac Ames.
Shelton, Philo S.	Boston.	" 27,	Isaac Ames.
Shepard, Warren ‖	Mansfield,	Feb. 2,	E. H. Bennett.
Simpson, Reuben	Rockport,	Sept. 28,	John G. King.
Stanton, Bradford N.	Taunton,	Aug. 3,	E. H. Bennett.
Swift, Erdix T. ‡‡	Boston,	Sept. 24,	Isaac Ames.
Tay, A. I. §	Boston,	" 15,	Isaac Ames.
Upton, Albert C.	Fitchburg,	" 3,	Alexander H. Bullock.
Wade, Ranson S.	Clarksburg,	" 24	Shepherd Thayer.
Wallace, Wm.	Cambridge,	" 1,	John W. Bacon.
Wood, Wm. G. **	Worcester,	" 5,	Alexander H. Bullock.

* Heretofore as A. & S. D. Ballard, in Plymouth.

† Partners.

‡ Chubbuck & Martin.

§ Fowler, Dyer & Co.

‖ Warren, Shepard, et al.

¶ A. & H. Hunt.

** Wood & M'Farland.

†† Business at Medfield.

‡‡ Individually and as late partner of L. W. Smith, by the firm of Smith & Swift.

§§ Members of the firm of Fowler, Rogers & Co.